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COMMISSION ON HUMAN RIGHTS
Fifty-eighth session
Agenda item 8

QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE

Note verbale dated 25 March 2002 from the Permanent Mission of Israel to the United Nations Office at Geneva addressed to the secretariat of the fifty-eighth session of the Commission on Human Rights

The Permanent Mission of Israel to the United Nations Office and Other International Organizations in Geneva presents its compliments to the secretariat of the fifty-eighth session of the Commission on Human Rights and has the honour to enclose herewith Israel's response to the report of Mr. John Dugard, Special Rapporteur of the Commission on Human Rights dealing with the West Bank and Gaza, dated 6 March 2002 and contained in document E/CN.4/2002/32.

The Permanent Mission of Israel requests that this document* be circulated as an official document of the fifty-eighth session of the Commission of Human Rights under agenda item 8.

* Reproduced as received, in English only.

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Annex

Response of the Government of the State of Israel to the Report of the Special Rapporteur of the Commission on Human Rights, Professor John Dugard, dated March 2002

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I. Introduction

1. The latest report submitted by the Special Rapporteur (E/CN.4/2002 32 dated 6 March 2002) is a clearly political document. The major thesis advanced by the Special Rapporteur is that the Israeli occupation of territories acquired in a war of self–defence in 1967 is the principal cause of the present crisis.

2. We strongly differ with this political statement. Firstly, terrorism should not be condoned in any way. No "root causes" can justify the resort to acts of terror targetting innocent people. As the Rapporteur aptly states in his introduction: "Terrorism is a scourge that threatens Palestinians and Israelis alike and every effort should be made to bring terrorism to an end".

3. The principle cause of the present crisis is a conscious decision by the Palestinian Authority to violate all pervious agreements made with Israel since 1993, which called for the resolution of differences through negotiations, and to embark on a campaign of violence.

4. Countless acts of terrorism, suicide bombings in the centres of Israeli towns and villages, drive-by shootings at Israelis travelling throughout Israel and the administered territories, dynamite charges and bombs placed under Israeli vehicles and in market places – all these acts of terror are part and parcel of the Palestinian Authority's campaign of violence against Israel.

5. Describing military occupation as the "main explanation for acts of terrorism committed by Palestinian against Israel" condones, if inadvertently, those who perpetrate these acts of terrorism, by not condemning them unequivocally. In this and other assertions the Special Rapporteur regrettably goes far beyond the inherent imbalance of his mandate. In addition he addresses and effectively prejudges issues agreed to be resolved between the two sides through negotiations.

6. Regrettably, this report, like the previous one, can only be interpreted as giving encouragement to advocates of violence and undermining genuine efforts to halt the current terrorism and resume peaceful negotiations. Israel has repeatedly stated that there can be no value in a report pursuant to a one-sided and anachronistic mandate. The current report is yet another proof of this assertion.

7. Still, we commend the Special Rapporteur for going beyond the realm of his mandate in a number of areas, finding that Palestinians have committed acts of terrorism against Israelis, violating important norms of international law and using force contrary to the norms of international law. He is also to be commended for reaffirming that the shooting of settlers cannot be justified, for stressing that settlers remain civilians and cannot not be treated as combatants unless they engage in military operations, and for supporting Israel's castigation of the Palestinian Authority for failing to arrest those responsible for terrorist attacks against Israelis.

8. Many of Israel's comments on the Special Rapporteur's previous report (contained in document E/CN.4/2002/129 of 7 December 2001), are equally valid with respect to many aspects of the Special Rapporteur's current report. A number of issues raised in this latest report cannot, however, pass without comment.

II. The Mandate of the Special Rapporteur

9. Israel's reservations concerning the mandate of the Special Rapporteur – many of which are shared by previous Special Rapporteurs - have been clearly stated and documented in various UN fora, including in Israel's response to the Special Rapporteur's initial report. In brief, this mandate violates the UN Charter principle of the sovereign equality of states in many respects, most significantly the fact that it prejudges the issues that the Special Rapporteur is supposed to investigate, concluding that Israel is guilty of committing violations before even considering any evidence. Further, the inherent imbalance of the mandate is reflected in its singling-out of Israel for criticism, while failing to allow the Rapporteur to address violations and provocation by the other party to the conflict. In addition, unlike any other country specific mandates, the Special Rapporteur's mandate is unique for being open-ended, failing to allow for any periodic review to reflect changes in

circumstances. Finally, the mandate fails to take any note of the significant changes in the region as a result of a series of agreements signed between Israel and the PLO, which led to transfer of territory, powers and responsibilities to the Palestinian side.

10. The Special Rapporteur does not address these fundamental failings of his mandate, but rather requests that the Commission consider this matter. Israel supports such a request but would emphasise that the issue is not one of "interpreting" the mandate, as the Rapporteur suggests, but rather amending the mandate itself. The mandate should be corrected so as to accord with the accepted principles of neutrality and impartiality. In particular, the mandate should not prejudge issues to be investigated, should enable the Rapporteur to consider all sides of these issues, and should not be open-ended. It should also take into consideration the many developments in the region and the agreements signed since its original adoption.

C. Status of the territories

11. The Special Rapporteur reiterates the assertion contained in his previous report that the situation throughout the territories is one of occupation, since Israel "has the power to intervene in the territories". He adds, as further proof of the fact of occupation, that Israel has conducted military incursions into parts of Area A.

12. Israel addressed this issue at some length in its response to the previous report, and so will merely reiterate here that, for a state of occupation to exist, international law requires that territory be "actually placed under the authority of a hostile army" (Hague Regulations) and further provides that protected persons are those who find themselves "in the hands of the... Occupying Power" (IVth Geneva Convention). It is the fact that these areas, particularly area A, are not under Israeli authority and that their residents are not "in Israel's hands" that has created the current situation in which the real authority in these areas, the Palestinian Authority, allows terrorists to act with impunity, and even official support. Had Israel genuinely had "effective control", and had the population genuinely been in Israel's "hands", Israel could have prevented the constant incitement to violence in schools, government-controlled media and mosques in the Palestinian-controlled territories. It could have confiscated the illegal weapons held in contravention of signed agreements, and prevented the para-military training of Palestinian youth and their deliberate indoctrination in the art of suicide bombings and martyrdom in summer-camps and schools, in flagrant violation of basic international norms and principles, not to mention the written commitments signed between Israel and the PLO. Israel could also have prevented the release of terrorists from Palestinian prisons, helping to prevent the murder of hundreds of Israelis and injuries of thousands more, by terrorist attacks emanating from Palestinian-controlled territory, since October 2000. But in fact, this is not the case. Israel lacks such control in these areas. Accordingly the measures undertaken by Israel to protect civilians, including measures taken in these areas in order to frustrate terrorist activity, are purely acts of self-defense and cannot be considered to constitute the effective control required to establish a situation of occupation.

13. The reference made by the Report to Article 47 of the IVth Geneva Convention is also disingenuous. As the Commentary to that article makes clear, it is intended to

ensure that a protected population will not be deprived of the benefits of the Convention by the establishment of a puppet regime "subservient to the will of the Occupying Power". It strains credulity to argue that the agreements freely negotiated between Israel and the PLO, witnessed by the leading states of the international community, and leading to free elections for the Palestinian Council, held in January 1996 under the scrutiny of international observers, could fall within the situation envisaged by Article 47.

IV. "Occupation and Terrorism"

14. The equation drawn by the Special Rapporteur in Chapter III of his Report, between "Occupation and Terrorism" is not only objectionable; it is also dangerous. While belligerent occupation is a situation recognized as valid under international law, and governed by norms and rules, terrorism is prohibited ***per se***, and, as repeated United Nations Resolutions have stressed, can have no explanation whatsoever and is "unjustified in all circumstances" (UNGA Res. 49/60).

15. Occupation may be a legitimate response to violent attacks, but no provocation can justify terrorism. However, the Special Rapporteur juggles around these principles so that occupation is no longer legitimate, but terror can be justified. A statement such as: "It is small wonder that Palestinians see the military occupation as... the source of violence in the region" can only be considered as a sympathetic justification of terrorism, especially when the Rapporteur later drops any pretense of presenting a "Palestinian perspective" and asserts that "the main explanation for the acts of terrorism committed by Palestinians against Israelis is the military occupation" (para. 13).

16. This shocking thesis seems to argue that the "main explanation" for terrorist attacks is not the terrorists who decide to blow up scores of innocent civilians but rather Israel's presence in the territories in the face of decades of Arab hostility and refusals to negotiate. It also ignores the fact that Palestinian terrorism has been at its most prevalent precisely at those times when Israel has demonstrated its most far-reaching willingness at the negotiating table. This has been the case throughout the years of negotiations, but has never been more evident than in the case of the current wave of Palestinian violence which was instigated not as a response to Israeli policies, but rather to try to camouflage the Palestinian refusal to respond to the most generous Israeli peace offer to date. Moreover, the Rapporteur's assertion that it is occupation that is the real cause of Palestinian terrorism also ignores the historical fact that the adoption of terrorism as the prime Palestinian strategy predated Israel's entry into the territories in 1967.

17. Perhaps most striking of all, in terms of the Report's treatment of the issue of terrorism, is the absence of any reference at all to the Palestinian Authority's direct and active role in instigating, planning and participating in the violence. While determining that "no doubt, that it [the PA] could do more to prevent the shooting of settlers and the culture of violence that produces suicide bombers", the Special Rapporteur also suggests that "the extent to which these actions are subject to the control of the Palestinian Authority is uncertain".

18. It is hard to see how such a forgiving judgement could be sustained in the face of the facts, such as the proven involvement of the Palestinian Authority in the smuggling of lethal heavy weaponry on the ***Karine A*** boat, the fact that over 50% of terrorist attacks in the past several months have been conducted by groups, including the ***Fatah*** and ***Force 17***, under the direct control of Yasser Arafat, and the overt incitement and support given to such acts publicly by the Palestinian leadership.

19. This double standard is also evident in the language and tone adopted by the Report. While Israel's security measures, taken in response to Palestinian violence and in full accordance with the Israeli-Palestinian agreements, are vilified in the strongest language, attacks by Palestinian "militarized groups armed with rifles, mortars and Kassam-2 rockets" – all in flagrant violation of agreed obligations - are, staggeringly, described as displaying "new determination, daring and success" (para.22).

V. Israeli Security Policy

20. The Report criticizes a number of specific Israeli actions. It is difficult to respond to these 'factual findings' since they are largely political assertions or unsubstantiated generalizations. Additionally, most of the allegations raised have been addressed by Israel in other contexts, including in Israel's submissions to the Mitchell Committee (available at www.mfa.gov.il) and in Israel's response to the Special Rapporteur's previous report (E/CN.4/2002/129 of 7 December 2001). However, a number of the Special Rapporteur's assertions should not go without comment.

21. **Targetting of terrorists**: The Report states that the targetting of terrorists cannot be reconciled with the IVth Geneva Convention which seeks to protect the lives of protected persons not taking a direct part in hostilities, and further asserts that "there is no basis for killing protected persons on the basis of suspicion that they have engaged or will engage in terrorist activities." But in fact there is no principle of law which requires a state to remain passive in the face of an armed attack. When terrorists are planning and perpetrating attacks against civilians with impunity from within areas under Palestinian jurisdiction, attempts to prevent them, including – where no other means is available – by targetting them, are a legitimate exercise of Israel's right of self-defence, and indeed its obligation to protect the lives of its citizens. Moreover, describing the targets of such attacks as "protected" persons, as the Report does, is inaccurate in the extreme. An individual who plans or engages in terrorist attacks, uses weaponry and armaments, and is part of a hostile military organization, is not a civilian and so is not entitled to the benefits accorded to protected civilians under the IVth Geneva Convention. As the ICRC Model Manual on the Law of Armed Conflict states:

> Civilians are not permitted to take a direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity.

22. **Demolition of houses:** On the issue of demolition of houses, the Special Rapporteur, while admitting that "there are doubtless instances in which houses have been demolished for genuine security reasons", goes further to assert that "the extent of the damage and the evidence of witnesses suggest that the destruction of houses, in many instances is not "rendered absolutely necessary by military operations" as required by article 53 of the Fourth Geneva Convention". He gives no indication of the basis for this assertion, and makes no reference at all to the fact that the houses in question have served as the bases from which bombs were detonated and hundreds of grenades thrown in the past months, and have been used to conceal illegal tunnels for the smuggling of terrorist arms and heavy weaponry. Clearly, before such drastic measures as house demolition are effected, serious humanitarian issues must be grappled with, but, as the Official Commentary to Article 53 indicates: "it will be for the Occupying Power to judge the importance of such military requirements".

23. It is also striking that the Special Rapporteur chooses to highlight the "horror" of house demolition with an emotive and graphic description culled from a report published by the Israel human rights organization Betzelem. Clearly the experience of a house demolition is a traumatic one, but it is notable that the experience of the many civilians, children, women and men, killed and maimed in drive-by shootings or suicide bomb attacks does not warrant similar emotive attention from the Rapporteur.

24. **Freedom of movement:** The Rapporteur devotes some considerable attention to the restrictions on freedom of movement including at international borders and checkpoints, yet makes no reference whatsoever to the repeated terrorist attacks, and the failure of the Palestinian authorities to prevent such attacks – indeed their active support and involvement, that have made such measures necessary. Assertions such as the observation that the city of Jericho "has been encircled by a deep trench to deny vehicles access to the city except through an IDF checkpoint", are presented as though they are the result of an arbitrary Israeli whim, and not an urgent attempt to prevent further loss of civilian life.

25. On the issue of checkpoints the Rapporteur goes yet further, and repeats the unsupported assertion from his previous report that these are not to try to protect civilians from terrorists and car bombs, but rather to "attempt to humiliate Palestinians and put pressure on them".

26. The Report stipulates that "it is impossible to reconcile the closure with articles 23, 55 and 56 of the Fourth Geneva Convention, which require the free passage of foodstuffs, clothing and medicines intended for certain vulnerable categories of persons". However, it fails to mention the numerous instances throughout this conflict of the abuse by Palestinian terrorists of protective symbols and of accepted principles relating to the relief of the wounded. One would have expected that the tragic reality in which terrorists place themselves in ambulances, disguising as paramedics, would be at least mentioned in the Special Rapporteur's Report. At the same time, Israel's efforts to facilitate, despite the dire security situation, emergency humanitarian assistance by UNRWA, the ICRC and the international community, are also not mentioned.

F. Involvement of children in the conflict

27. That children have suffered severely from the present crisis in many ways is doubtlessly true. The impact of the armed conflict on children in both sides, is one of the most agonizing aspects of the conflict. There is no doubt that the current violence assumed significant and tragic tolls on both sides. These costs are not one-sided. Children are truly blameless victims of any conflict. They are particularly vulnerable, and must stand apart from any political campaign regardless of the perceived justness of a cause.

28. It is therefore a striking indication of bias that, whereas the Report draws attention to regrettable incidents of death and injuries of Palestinian children, describing the effect of the present conflict on them, it fails to mention any similar injuries to which the children of Israel are exposed to on a daily basis. It makes no mention of the tragic impact of terrorism on Israeli children, who are savagely murdered by suicide terrorists in schools, and buses, in discotheques, pubs and pizza restaurants, in market places and in open streets, in shopping centers and in their very homes, on a daily basis. Nor does the Report make any reference to the profound effects of the current situation on Israeli children and their development, their psychological development and educational difficulties. On this issue, the Special Rapporteur's silence is deafening.

29. Furthermore, the Report lacks any presentation of the role played by the calculated use of Palestinian children in perpetrating violence, or the fact that they have been used quite consciously as part of an orchestrated Palestinian campaign. The Report does not present nor assess the wealth of evidence which shows how children have, in fact, been actively encouraged to become involved, nor does it raise the issue of official responsibility of the Palestinian authorities for these children's actions, such as the arrangements made by the Political Guidance Department of the Palestinian Authority for children to leave school especially for the purpose of taking part in violent hostilities. The active recruitment and involvement of children in the conflict, both as combatants and as human shields, is, of course, a serious breach of basic international norms and principles.

30. Nor does the Special Rapporteur mention the diet of hatred on which Palestinian children have been raised. They have been taught that Israelis are the eternal enemy and that Jews are demonic. In all matters relating to Israel and Jews there is a total denial of historical fact that is impossible to square with the Report's assertion that "Education is a top priority in Palestine [*sic*]". Additionally, many children are indoctrinated and military-trained in the art of suicide bombings and martyrdom in summer-camps. The relentless incitement and de-legitimization of Israel in the Palestinian public media, mosques and educational institutions, deprives yet another generation of even the possibility of contemplating peace.

31. The Special Rapporteur also makes serious accusations regarding Israel's administration of justice and, particularly in its treatment of children detained under its custody. These allegations are made without any specific details whatsoever. While Israel relates with extreme seriousness to any charge of ill-treatment of children, and investigates any specific allegation, it is practically

impossible to respond to such unsubstantiated charges. Nonetheless, several general observations are warranted.

32. Israel has never claimed that the struggle against terrorism constituted an exceptional circumstance that justified the use of any inhumane treatment. The prohibition of torture constitutes an integral part of Israeli law and jurisprudence. In this regard, the Supreme Court decision on the prohibition of using physical interrogation techniques of suspected terrorists, was cited by the Special Rapporteur, but with certain legal misreadings, implying that "torture" might be employed in cases of "necessity", where it is imperative to obtain information about "ticking bombs".

33. This, however, is not the decision of the Supreme Court. To the contrary, the Court held that Israeli officials conducting interrogations are not authorized to use torture, even in cases where the use of such procedures might have prevented terrible attacks. The use of cruel, inhuman or degrading procedures is likewise prohibited. Investigators who fail to comply with these provisions are liable under the law, unless they fall within a strictly circumscribed defence of "necessity".

34. Following the Supreme Court's decision, the Attorney –General convened a meeting with representatives of the ISA (Israeli Security Agency) in order to ensure the immediate implementation of the ruling. In line with the Attorney-General's instruction, strict implementation of the ruling has been observed by the ISA.

35. Any person under interrogation is entitled to file a complaint against his interrogators. The investigation of such complaints is conducted under the professional direct supervision of the Ministry of Justice.

36. Additionally, any alleged ill-treatment during investigation may be challenged directly before the Supreme Court, sitting as the High Court of Justice. Any individual who feels that he or she has been wronged - and this may include not only the detainee or his family, but also, under the broad rules of standing in Israeli law, virtually any person or group who claims an interest in the legal or humanitarian issues involved – may have his or her petition heard by the High Court of Justice within 48 hours of being filed.

37. This right is accorded to all persons, whether or not Israeli citizens, including residents of the territories. In this respect, Israel is the only country in the world that has granted access to its highest court to non-citizens petitioning against administrative measures.

38. Finally, in this regard, Israel must express its astonishment at the data included by the Special Rapporteur, particularly the statistics regarding Palestinian minors in detention. No basis for these figures is given, and in view of the massive discrepancy between them and the figures available to the Rapporteur from Israeli sources, it is remarkable that they were included in the Report without any question as to their accuracy.

VII. Humanitarian Law and Human Rights Law

39. Throughout this Report, like its predecessor, the Rapporteur makes extensive legal reliance, not only on the instruments of humanitarian law, but also instruments of human rights law, in particular the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC). To justify doing so, he argues that the provision in Article 27 of the IVth Geneva Convention requiring respect for the human rights of protected persons means that the provisions of human rights instruments must be imported to complement the provisions of humanitarian law.

40. As noted in Israel's response to the first Report, this is a radical departure from the accepted understanding of international law, according to which human rights and humanitarian law are distinct regimes, with different origins, codified in different instruments and applicable in different circumstances. While there is a clear connection between these two bodies of law, and that there may well be a convergence between them in some respects, as they both share the fundamental notion of humanity and respect for human dignity, the current state of international law and state practice, is that these two legal regimes are nevertheless distinct and apply in differing circumstances.

41. Thus, far from being an invitation to import provisions from treaties protecting human rights in times of armed conflict, humanitarian law is the expression of that protection. This, in fact, is the correct reading of the Vienna Declaration of the World Conference on Human Rights quoted by the Special Rapporteur, which states that "effective legal protection against the violation of [people under occupation's] human rights should be provided, in accordance with human rights norms and international law, particularly the Geneva Convention relative to the protection of Civilian Persons in time of War." In other words, the IVth Geneva Convention, and the international humanitarian law framework of which it is a part, ***is*** the human rights regime for situations of occupation, not a partial arrangement requiring to be supplemented by human rights treaties concluded for the very different context of protection of citizens from their own government in times of peace.

42. It should also be noted that the Special Rapporteur's approach, of holding Israel responsible under human rights treaties for abuses perpetrated in areas under Palestinian jurisdiction, effectively absolves the Palestinian side for its failure to fulfill its own responsibilities in this regard. And indeed, the silence of the Special Rapporteur with regard to widespread human rights abuses of the Palestinian Authority in areas under its jurisdiction, is striking.

H. Special Rapporteur's Recommendations

42. As in his previous report, the term "recommendation", as used by the Special Rapporteur, is virtually synonymous with "unilateral Israeli concession." Among these recommendations are the following:

43. Settlements: The most insistent recommendation made by the Special Rapporteur relates to Israeli settlements. The Special Reporter cites the Mitchell Report as evidence that "peace is impossible without a complete freeze on all settlement activity". He conveniently disregards the Mitchell Framework which only contemplates such a freeze after an effective cease-fire and cooling off period. He also determines that an immediate freeze is not sufficient: "It is not enough to merely impose a freeze on settlements. Steps must start now to dismantle settlements". This is also in clear disregard for the terms of the peace process, under which settlements are to be addressed in the framework or permanent status negotiations. For the Special Rapporteur the negotiations will not start until Israel has unilaterally conceded the issues to be negotiated.

44. International presence: the Special Rapporteur calls for the introduction of an "international peace-keeping mission". But in fact the only step required to achieve an end to the current violence, is for the Palestinian leadership to comply with its responsibility to act against the terrorism emanating from areas under its control. Until that happens no international presence will have any effect. Indeed, the Mitchell Report refrained from recommending the introduction of an international presence. It went on to caution that such a presence could only be effective "with the consent of all of the parties involved". Unlike the Special Rapporteur, the Mitchell Report realized that responding to Palestinian instigated violence by conceding to a Palestinian request to internationalize the conflict would bring neither peace nor stability, but only reward a policy of violence, and encourage it as a tactic to gain further concessions.

45. Most striking of all in the Special Rapporteur's recommendations, indeed in the entire Report, is the absence of any reference whatsoever to the peace process, and the series of agreements reached between Israel and the Palestinians. While decades of politically-motivated resolutions of the Commission on Human Rights, and reports like the current one, did absolutely nothing to bring the Palestinian people one iota closer to their national aspirations, it was direct negotiations and these agreements that brought about Palestinian elections, the establishment of Palestinian institutions, and a situation in which over 98% of Palestinians of the territories live under Palestinian, not Israeli, rule.

46. But the Special Rapporteur makes no reference to the peace process nor the Palestinian rejection of negotiation and adoption of violence as their approach to settling differences, in direct contravention of obligations contained in every one of the Israel-PLO agreements. Indeed for the Special Rapporteur there seems to be little to negotiate. The Report is rife with political assertions which prejudge issues to be negotiated. Territories under Palestinian jurisdiction are termed "Palestine" while the Palestinian entity is described as a "nascent state". Similarly on the issue of refugees (which he candidly admits to be outside his mandate) the Rapporteur

rewrites UN GA Resolution 194 to establish a "right" of return. Why indeed should any Palestinian want to return to the negotiating table when the Special Rapporteur is available to resolve all continuous issues in his favor?

IX. Concluding Comments

47. The reporting activity of the Special Rapporteur in the territories presents Israel with a sensitive dilemma. Refusing to cooperate with the Rapporteur means that Israel forgoes the opportunity to have its case presented before the authors of the Report and to seek to redress misperceptions and inaccuracies in advance. On the other hand, active cooperation could only be interpreted as acceding to the objectionable mandate under which the Special Rapporteur operates. This has been the reason for Israel's decision not to cooperate to date.

48. The two reports submitted by the current Special Rapporteur give Israel no reason to consider changing this policy. There is little or no evidence to suggest that a frank dialogue about the dilemmas facing Israel in confronting terrorism, or seeking to get back to the negotiating table, or trying to alleviate the hardships facing Palestinians in the territories, would have any impact whatsoever on the fixed political outlook apparent in the reports.

49. At a time when Israelis are facing an unprecedented campaign of brutal terrorist attacks, and when the Palestinian leadership involvement in such attacks has never been clearer, there is an alarming disconnect between the picture painted by the Report, and that experienced by the people of the region. The fact that an international body with the potential to play a constructive role in improving the welfare and prospects of the people of the region has chosen to squander this potential on a political tract is to be deeply regretted, not only by Israel but by anyone with a genuine concern for the future of the region.

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QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE

Note verbale dated 28 March 2002 from the Permanent Mission of Israel to the United Nations Office at Geneva addressed to the secretariat of the fifty-eighth session of the Commission on Human Rights

The Permanent Mission of Israel to the United Nations Office and Other International Organizations in Geneva presents its compliments to the secretariat of the fifty-eighth session of the Commission on Human Rights and encloses herewith a letter of 28 March 2002 to Mr. Jakubowski, Chairperson of the fifty-eighth session of the Commission on Human Rights, concerning the suicide bombing of 27 March 2002.

The Permanent Mission of Israel requests that this document* be circulated without delay as an official document of the fifty-eighth session of the Commission of Human Rights under agenda item 8.

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Annex

Mission Permanente d'Israël
auprès de l'Office des Nations Unies
et des Organisations Internationales à Genève

משלחת ישראל
ליד משרד האומות המאוחדות
והארגונים הבינלאומיים בג'נבה

Mr. Krzysztof Jakubowski
Chairperson
58th Commission on Human Rights
OHCHR
Palais des Nations
1211 Geneva 10

Geneva, 28 March 2002

Dear Mr. Jakubowski,

With deep sorrow we must inform you today, on this holy Jewish holiday about a revolting crime that was committed last night while people all over Israel were celebrating the Passover. At 7:30 P.M. on Wednesday evening, a Palestinian suicide bomber walked into the dining room of the Park Hotel in the coastal town of Netanya, where a large number of people were participating in the Passover service, and detonated an explosive device. Nineteen people were killed and over 100 were wounded 23 seriously.

The Hamas took responsibility for the attack. The group identified the bomber as Abdel-Basset Odeh, a member of its military wing, the Iz a Din al-Kassam Brigades. Odeh had been on Israel's wanted list for four years. Repeated appeals to the Palestinian Authority to arrest the suspect were flagrantly ignored.

Since the arrival of the American Envoy, General Zinni, to the area, Israel has made every effort to ensure that his mission was successful. The Palestinian Authority and Chairman Arafat, however, failed to take any substantial steps to halt the Palestinian terror. Therefore, they are to be held responsible for this terrible crime.

The perpetrator and those who were behind this revolting crime have lost all sense of humanity and Israel will not rest until they are brought to justice.

Israel calls upon the international community to make clear to the Palestinian Authority and its leader, the gravity of this situation and the difficult consequences it entails, and to ensure that the Palestinian Authority takes every possible step to prevent planned acts of terror about which we have been informed.

Sincerely yours,

Tuvia Israeli
Deputy Permanent Representative

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COMMISSION ON HUMAN RIGHTS
Fifty-eighth session
Agenda item 10

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Letter dated 5 March 2002 from the Permanent Representative of Germany to the United Nations Office at Geneva addressed to the United Nations High Commissioner for Human Rights

I have the honour to enclose herewith the report of the International Commission of Jurists round table on the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), held in Geneva on 30 November 2001.

The purpose of this conference was to provide a forum for the exchange of views between State representatives, organizations and experts in the field of economic, social and cultural rights on a wide range of issues pertaining to the ICESCR and to a possible draft optional protocol.

I am of the opinion that the report of this conference contains a number of very valuable ideas and is likely to make an important contribution to the ongoing debate on this matter.

I would therefore be most grateful if you could have this report* distributed as a document of the fifty-eighth session of the Commission on Human Rights, under item 10 of the agenda.

(Signed): Walter LEWALTER
Ambassador
Permanent Representative

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INTERNATIONAL COMMISSION OF JURISTS
Commission internationale de juristes - Comisión Internacional de Juristas
" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

Report of the Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Hosted by the International Commission of Jurists

30 November 2001

Geneva, Switzerland.

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INTRODUCTION

On November 30, 2001, the International Commission of Jurists convened a roundtable on the draft Optional Protocol, (hereinafter draft OP), to *the International Covenant on Economic, Social and Cultural Rights*, (hereinafter ICESCR or the *Covenant*). The purpose of this conference was to provide a forum for the free exchange of views between State representatives, organisations and experts in the field of economic, social and cultural rights, (hereinafter ESC rights), on a wide range of ICESCR and draft OP issues. To this end, participants were advised that, apart from expert submissions, all discussions would be reported on a non-attributable basis.

Introductory remarks by Hatem Kotrane, Faculté des Sciences juridiques, politique et sociales de Tunis and independent expert appointed by the Commission on Human Rights to examine and submit a report evaluating the draft OP.

Professor Kotrane posed five questions to govern the roundtable discussions, the answers of which he considered integral to the writing of his report:

I. Who would be entitled to utilise the proposed OP complaints/communications procedure?

II. What organ would be competent to assess complaints under the proposed OP system;

III. Which *Covenant* rights would constitute the foundations for the proposed complaints/communication procedure?

IV. Against whom would the proposed complaints/communication procedure be engaged?

V. Under the proposed OP complaints/communications procedure, what remedial actions could be taken to counteract the violation of *Covenant* based ESC rights?

1. *COVENANT* RIGHTS: PRECISION AND CLARITY

1.1. ***Introductory presentation to Part I of the roundtable by Professor Eibe Riedel***, member of the United Nations Committee on Economic Social and Cultural Rights, Office of the High Commissioner for Human Rights.

Professor Riedel commenced his introduction with an overview of the restrictive interpretations and misconceptions associated with ESC rights.

(i) The ICESCR vs. the ICCPR: Vagueness

Professor Riedel reviewed the contention that whereas ICCPR rights seem precise, explicit and self evident, those found within the ICESCR, by their very nature, seem vague and less precise, eliciting only programmatic norms of intent as opposed to directly binding legal obligations. In his view, all human rights treaty text formulations, including the ICCPR, are open and vague,

this being linked to the human rights philosophy of formulating texts in the abstract to allow for future/unforeseen applications. In practice, this level of abstraction has been mitigated by decades of international human rights practice, governing treaty body jurisprudence and general comments that assist in elucidating the full meaning of various treaty provisions.

Critics assert that the vague nature of ICESCR rights is demonstrated by the fact that the five other United Nations treaty bodies, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Human Rights Committee, currently possess complaints procedures while the Committee on Economic, Social and Cultural Rights, (hereinafter the Committee), is merely a creation of ECOSOC and has not been endowed with its own complaints procedure. In response, Professor Riedel pointed out that the fact that the ICESCR left it to ECOSOC to formulate rules for Committee establishment and governance does not demonstrate ICESCR vagueness and its unequal treatment when compared with civil and political rights.[1]

(ii) The ICESCR Text: Non Self-Executing Norms

A frequently voiced argument theorises that the ICESCR textual discourse supports the view that while ICCPR rights, in the operative third part, are phrased in such a way that accords individuals immediate claim rights/entitlements, *Covenant* rights are phrased in much more cautions language[2] reducing the meaning of *Covenant* rights to a series of non-self-executing norms of purely programmatic content. Professor Riedel asserted that this argument is flawed as, read carefully, the ICCPR reveals similar formulations of mere state obligations in articles 3, 6(2), 6(3), 10(3), 14(4), 18(4), 21, 22, 23(1) and 23(4). Further, Committee jurisprudence has consistently interpreted the substantive provisions of the ICESCR in such a way that every right from articles 2(2), 3 and articles 6 through 15 contain at least some elements of obligations to respect, protect and fulfil which lend themselves to direct applicability, similar to ICCPR rights.

(iii) ICESCR and ICCPR Development: Political Influences

Critics of an OP to the ICESCR frequently argue that the *Covenant's* drafting history supports a discriminatory view of ESC rights as compared with their civil and political rights counterparts. Professor Riedel analysed this contention through the political influences surrounding the ICESCR and ICCPR throughout their development. Here, it was revealed that despite the 1948 Universal Declaration on Human Rights pledge regarding the universality and indivisibility of all human rights, this unity was disrupted in 1954 as mirroring the ideological cleavage between East and West. While Western States favoured directly enforceable civil and political rights, planned economy Eastern States favoured economic and social rights as more in line with their collectivist visions. Further differing from Western conceptions, Eastern States regarded civil, political, economic social and cultural rights as non self-executing obligations to be integrated into Soviet Bloc legal systems according to the relevance accorded to them in the socialist context, i.e. subject to socialist legality and the primacy of policy considerations over legal propositions. With the demise of the Soviet Bloc, the aforementioned East-West ideological cleavage became redundant and speculation abounded that as former Socialist States accepted

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[1] In any event, through resolution, ECOSOC ensured that, in practice, the Committee follows the model established by other treaty bodies in relation to State reporting thus making the Committee a treaty body in all but name.

[2] for example, "the parties recognise the right", or "undertake to ensure" or simply "recognise".

the full and direct binding nature of civil and political rights, Western States would reassess their critical stance toward ESC rights and accept the direct applicability of either some ESC rights components or a limited number of core ESC rights on the same footing as civil and political rights. Unfortunately, civil, political, economic, social and cultural rights unity did not materialise, the vacated East-West ideological trenches were replaced with new ideological cleavages based on the North-South divide which developed during the mid-1970's with the propagation of new world orders, solidarity, development concepts and poverty reduction schemes. Within this context, Western States shifted their ideological defences against ESC rights direct applicability and the binding nature of ICESCR norms in order to avoid potential developing nation claims for access to resources, fairer terms of trade and economic and technical international assistance/co-operation under ICESCR article 2(1).

(iv) ICESCR OP: Developing Nation Hesitations

Another point of criticism against an OP to the ICESCR emanated from developing nations that either explicitly or implicitly voiced opposition rooted in the fear that a directly applicable fully binding ICESCR could lead to a human rights imbalance wherein developing nations would be singled out for non-fulfilment of ESC rights criticism due to their financial inability to guarantee the full realisation of *Covenant* rights.

In response, Professor Riedel pointed out that the ICESCR concerns itself with the basic satisfaction of certain individual/group core rights that are well within the means of developing nations to satisfy. Coupling State discretion with the international communities' obligation to provide technical assistance and co-operation in the "progressive realisation" of ESC rights means that developing nations would not be lead into a human rights imbalance wherein they would be singled out for the non-fulfilment of ESC rights.

(v) *Covenant* Rights: The Committee's Position on Direct Applicability

In conclusion, Professor Riedel advised that the Committee has consistently held the view that a comprehensive approach should be adopted towards the ICESCR whereby all *Covenant* rights would be capable of direct applicability with possibilities for collective rights guarantees coupled with other obligations addressed to States Parties as non-self executing obligations.

1.2. ROUNDTABLE DISCUSSION ON ESC RIGHTS

(i) ESC Rights: Justiciability

Roundtable participants considered the issue of ESC right justiciability and several pointed out that the domestic jurisprudence of numerous nations including South Africa, Canada, France, and India has demonstrated the increasing acceptance of the ESC rights justiciability on the national level, an acceptance that has extended into the international arena through the collective complaints mechanism built into the Optional Protocol to the European Social Charter. Professor Riedel supported the notion that, under the draft OP, justiciability would relate to the respect, protect and part of the fulfil typology developed by the Committee for the realisation of ESC rights. The aforementioned fulfilment obligation is subdivided into the obligation promote/inform and the obligation to provide. The obligations to respect, protect and the promote/inform subdivision of the fulfilment obligation are clear cut, would not involve a weighing of State resource allocation prioritisations and would be readily justiciable within the draft OP context.

(ii) *Covenant* Rights: Interpretative Mechanisms

The concern was raised as to whether *Covenant* rights and obligations were sufficiently clear/precise with reference to the variable content of article 2 and the parasitic nature of articles 1 through 5 as applied to the rights and obligations contained in ICESCR articles 6 through 15. The view was expressed that the interpretative issues raised through the said configuration made it difficult to define, as a matter of objective standards, where States Parties obligations would lie under the ICESCR, how States would comply with *Covenant* obligations at any particular time and how it would be possible to objectively compare the extent to which States Parties were fulfilling their ICESCR obligations.

In reply, one roundtable participant advised that whenever treaty systems of international petitions, communications and/or remedies are introduced, it is not always certain how the treaty body interpreting the instrument is going to decide a particular case or interpret specific aspects of the text in question. With regard to the OP to the ICESCR, some participants suggested that future jurisprudence would clarify numerous issue areas and norms as was the case when the Human Rights Committee adjudicated ICCPR rights and obligations. For the present, the Committee has adopted quite a number of General Comments[3] that have clarified ICESCR subject areas such as health, housing and social security. Beyond that, ICESCR rights and obligations can be clarified through: ILO practice/standards; other international practice/standards in particular areas; and commonly agreed to national standards.[4]

(iii) ICESCR Article 2(1): Progressive Realisation and ICESCR OP Effect on State Prioritisations

In response to questions regarding the "fulfil" aspect of the ICESCR article 2(1) "progressive realisation", Professor Riedel was of the view that this concept meant that countries who start from a relatively low level on the development scale will have to comply with a lower degree of ESC rights realisation than developed nations as the *Covenant* only requires what is possible under the "minimum core" doctrine. The Committee has clarified that there is a "minimum core obligation" incumbent on each state to ensure the satisfaction of, at the very least, minimum essential levels for each *Covenant* right. Such obligations were formulated to not be unnecessarily onerous especially if developed nations provide co-operation and technical assistance under *Covenant* articles 2(1), 22 and 23. With reference to the chart, below, it was noted that the respect and protect obligations and the promote/inform subdivision of the fulfilment obligation would not involve positive economic commitments from states.

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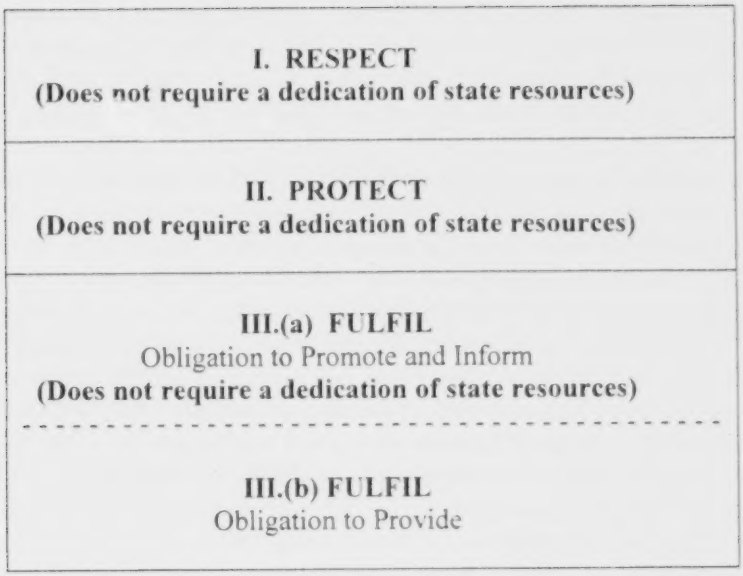
[3] With regard to the formulation of ICESCR General Comments, Professor Riedel pointed out that the Committee engages in extensive discussions with States Parties and specialised agencies most closely involved with particular *Covenant* articles before a General Comment is written and that this work will continue. Further, the Committee remains dedicated to ESC rights and obligations clarification however, the international community should not wait for the Committee to comment on the whole of the *Covenant* before proceeding with an OP to the ICESCR as it is now time for States Parties to move the process forward.

[4] By way of support for the aforementioned through comparison, Professor Harris added that the rights under the European Convention on Human Rights were originally rather vague however, the European Court of Human Rights set itself on the substantive clarification of same.


I. RESPECT
(Does not require a dedication of state resources)
II. PROTECT
(Does not require a dedication of state resources)
III.(a) FULFIL
Obligation to Promote and Inform
(Does not require a dedication of state resources)
III.(b) FULFIL
Obligation to Provide

The floor opened to a question concerning the possibility that the ICESCR OP complaints procedure coupled with the "immediate application" provision of article 2(1), could be used to question national public policy prioritisations. In response, Professor Riedel advised that the international human rights system employed three approaches in rectifying potential/actual human rights violations: political; quasi-judicial; and judicial. Under the ICESCR, the Committee is concerned with the provision of quasi-judicial remedies, however, this procedure is not judgment oriented, it is an extension of the political process highlighting constructive dialogue. Here, complaints concerning public policy would not lend themselves to the draft OP remedial procedure as this is the classic area of the State reporting system that builds a constructive and co-operative dialogue between States Parties and Committee members. Within this process, the Committee only urges that *Covenant* rights and obligations be utilised as checklists in deciding national priorities. Professor Harris added that it is not the function of the Committee to stand in the shoes of the State prognosticating on the appropriateness of national resource allocation as the Committee only focuses on irrational state policies that no reasonable political actor would condone. Here, while the Committee would want to offer a wide margin of appreciation, there would be flagrant cases, e.g. where there is State inaction in a particular regard or where the State is acting in a clearly discriminatory fashion. In such cases, the Committee could properly and confidently step in to offer remedial suggestions.

(iv) ICESCR OP Effect on Self Determination

ICESCR article 1 sets forth the principle of "all peoples... right of self-determination." A tabled question concerned whether an ICESCR OP complaint could be validated regarding the enjoyment of the aforesaid right thereby politicising the role of the Committee. In response, it was pointed out that ICCPR article 1 was identical to the ESCR *Covenant* article in question. Under the ICCPR article, the Human Rights Committee decided that there is no right of petition under it's Optional Protocol because that article concerns a right of peoples whereas the Optional Protocol to the ICCPR concerns individuals. Professor Riedel was of the view that the same reasoning would be applied to a complaint lodged under ICESCR article 1 despite the fact that the Committee has previously acknowledged the possibility that ESC dimensions to the right of self determination could be the subject of a petitions procedure. Here, it is possible that a

Working Group could specify that there would be no right of petition with regard to a peoples' right of self-determination.

(v) ICESCR OP Inquiry Procedure

One roundtable participant requested clarification on the substantive content of the inquiry procedure that the Committee, if appointed as the treaty monitoring body under the ICESCR OP, would use to investigate State failings concerning the "provide" subdivision of the obligation to fulfil. In response, it was recalled that, in the Committee's opinion, ICESCR rights have attendant obligations to respect protect and fulfil, with fulfilment being subdivided into an obligation to "provide" substantive right realisation and an obligation to "promote or inform".[5] With regard to investigations of States Parties fulfilment obligations to provide, Professor Riedel recommended an inquiry procedure similar to the one developed under the CEDAW Optional Protocol. Here, State obligations to provide would not be the subject of an individual/group ICESCR OP complaints procedure as, due to difficulties in the assessment of claims, it would not be politically appropriate to have individuals claiming against States for failing to provide. Within this context, States and the Committee could engage in constructive dialogue aimed at furthering the process while not directly questioning States Parties allocation of resources.

2. ICESCR BREACH: REMEDIAL FRAMEWORK

2.1. ***Introductory presentation to Part II of the roundtable by Professor David Harris***, University of Nottingham Faculty of Law in the United Kingdom.

Professor Harris commenced his introduction with an overview of numerous issues relating to possible remedies under an OP to the ICESCR.

(i) *Covenant* Rights Subject to an OP Complaints Procedure

Professor Harris adopted the Committee's opinion that an ICESCR OP complaint should be capable of being brought in respect of any *Covenant* right, with the exception of the article 1 self determination right as this is a would present certain political difficulties, discussed *supra* in s. I.(i). Articles 2 - 5 enunciate general governing principles and are therefore separate from articles 6 - 15 that feature substantive rights guarantees. The difference between the two sets of rights means that the former are not sufficient in and of themselves to form the basis of an ICESCR OP complaint as they have to be connected with one of the substantive article 6 to 15 rights in order to be activated.

Professor Harris acknowledged that given limited State resources available for the satisfaction of ICESCR obligations, as a general rights restriction, the OP complaints procedure should not be able to augment substantive *Covenant* rights realisation for so called expensive rights such as the right to health, social security, education etc.. Here, however, it was emphasised that there are other less intrusive aspects within the obligations to respect, protect and fulfil that are of some considerable impact and can lead to successful individual communications. See *supra* at s. I.(j).

With regard to ICESCR article 2(1) concerning international co-operation and assistance, Professor Harris was of the opinion that this obligation should not be operable through an

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[5] e.g. informing about HIV/AIDS programs and health hazards concerned with the disease while not providing medications.

individual complaints procedure as it would more properly operate through Committee communications within the State reporting context. To illustrate this point Professor Harris cited the obvious attendant difficulties on an individual in a village lacking in basic sanitation/safe water in bringing an ICESCR OP complaint alleging a lack of international co-operation.

(ii) Against Whom Should ICESCR OP Complaints Be Brought

Professor Harris asserted that ICESCR OP complaints must be launched against the States Parties to the *Covenant* as they are the only obligation holders under this international instrument. With regard to potential complaints against trans-national corporations and other non-state actors, Professor Harris indicated that while these entities cannot be made directly liable as they are not *Covenant* signatories, positive obligations exist on States in respect of all non-state actors either wholly or partially within their jurisdiction.

(iii) Possible ICESCR OP Remedies

As a general point Professor Harris mentioned that Article 8 of the draft OP states that the Committee[6] may recommend that State Parties take specific measures to remedy substantiated violations. Article 8 is thus quite precise as while the Committee "may" recommend remedial state actions, such recommendations are not mandatory.

Remedial possibilities under the ICESCR OP would include:

(**a**) *declaratory pronouncements.* If one looks to the practice of bodies such as the European Social Charter Committee, the European Committee for Social Rights and/or the ILO Freedom of Association Committee, these bodies answer successful complaints by way of declaratory pronouncements which are left to the discretion of individual States to redress. The Human Rights Committee employs a standard formula calling upon ICCPR offending States to take effective and enforceable remedial action which must be communicated to the Human Rights Committee within a certain time period, typically 90 days. Occasionally the Human Rights Committee recommends the type of action to be taken as envisaged under the ICESCR OP, (as here specific remedial measures for ICPPR violations may be recommended).

(**b**) *compensation.* One remedy that may be considered under an ICESCR OP is the recommendation that the State pay victim(s) compensation as validated through the practice of the Human Rights Committee, the Committee Concerned with the Elimination of Racial Discrimination and the ILO Freedom of Association Committee that have occasionally recommended that State compensation be paid to specific victims.

(**c**) *the enactment or enforcement of legislation.* There will be situations where the Committee will be asked to make recommendations with regard to individual State social policies to do with, for example, education, housing, social security or healthcare. Here, the Committee might recommend States to enact or enforce legislation that, in very general terms, meets *Covenant* requirements. There is, however, a question as to how far Committee recommendations can go where they concern the allocation of finite State resources. In making such recommendations the Committee would be following the practice of the Human Rights Committee and the European Social Charter Committee that advocated similar remedial actions.

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[6] For the purposes of this section it is assumed that the Committee will be the ICESCR monitoring body under the OP.

Further, the Committee could make remedial recommendations with regard to bringing State administrative practices more in line with ICESCR obligations.

(**d**) *a public law judicial review approach.* Where OP complaints concern *Covenant* rights fulfilment obligations that involve large scale amounts of money, the Committee cannot easily or comfortably investigate situations and advise States how to allocate their resources. This said, a public law judicial review approach could be adopted to look into the impugned area to determine whether the State has a policy at all and if so, whether it is reasonable. Further, the Committee could examine the State policy to determine if it is fundamentally flawed on a point of substance. On the national level, the aforementioned process was utilised by the South African Constitutional Court in *Government of the Republic of South Africa* v. *Grootboom.* Here, through an examination of South African housing policy, the Court found that no provision had been directed at ameliorating the conditions faced by individuals in desperate need of basic housing. Flawed in a substantive regard, the housing policy was held to be unreasonable. Within the context of the right of access to housing, the Court held that State policy, in order to be reasonable, had to take account of the different socio-economic levels of the South African population and could not ignore those whose needs were most urgent.

(**e**) *an examination of regressive State financial measures.* The Committee could examine State regressive financial measures as they impact upon ESC rights domestic policies and comment on whether there was justification for the cutbacks.

(**f**) *remedial actions.* There are numerous remedial actions that the Committee might avail itself of as seen through other international remedial mechanisms. For example the ILO Freedom of Association Committee, in confronting the situation of the unjustified detention of trade union representatives, recommended their release.

(**g**) *friendly settlement.* There could be OP remedial provisions concerning "friendly settlement" procedures. A friendly settlement procedure is used very successfully and with increasingly frequency by the European Court of Human Rights which avoids the need for a final decision on a complaint merits by the way of a recommendation.

2.2. ROUNDTABLE DISCUSSION ON ICESCR BREACH: FRAMEWORK AND POSSIBLE REMEDIES

(i) ICESCR OP Complaints: Standing

The issue was raised as to who would have standing to bring complaints under the ICESCR OP. In response, the view was expressed that, at a minimum, individual and group victims of State *Covenant* violations would possess this right. With regard to claims being brought by NGO's on behalf of groups or individuals, Professor Riedel advised that most members of the Committee believed that *locus standi* questions should be interpreted widely with the underlying restriction that there had to be a specific victim, otherwise several complaints by NGO's and other bodies of civil society could risk Committee politicisation.

(ii) ICESCR OP Complaints: Timing

Article 3(3)(a) of the draft OP provides that a complaint cannot be brought before the Committee until all domestic remedies have been exhausted. In response to a question requesting clarification on this issue, a participant indicated that the "exhaustion of all domestic remedies"

provision is standard in respect of international claims/communications procedures. Following the practice of the Human Rights Committee and the Inter-American Commission, complainants must proceed through national legal systems and avail themselves of domestic remedies before an international complaint is launched unless the provision of domestic remedies are mired in excessive delay. Where there is clearly an unreasonable delay, an ICESCR OP complainant could proceed.

(iii) ICESCR Article 2(1): International Co-operation and Assistance

One conference participant questioned the meaning of ICESCR article 2(1) "international assistance and co-operation" and whether a complaint could be brought against a State for not providing this to augment the substantive realisation of *Covenant* rights. Another roundtable participant expressed the view that the envisioned OP complaints procedure would be between state and individual/group victims. Within this dynamic, the international co-operation and assistance dimension/obligation would have nothing to do with the state/victim dichotomy and thus could not be linked to the ICESCR OP complaints process. Professor Harris advised that one should read the ICESCR article 2(1) obligation of progressive realisation as an obligation of the State Party trying to fulfil the obligation rather than as an obligation of other States to assist. It would be unhelpful to the discussions of the OP to allow it to take on a character of somehow being a State to State issue on whether there had been international assistance or not. The obligation has to be perceived as one of States Parties taking steps to achieve the realisation of the *Covenant* rights and one method under which ICESCR rights may be realised is through collective assistance and co-operation. There should not be a justiciable obligation on other States to provide specific assistance, however, the lack of means, including the lack of assistance, could be used to indicate why certain measures could not be undertaken.

Whereas one participant thought it would be difficult to identify that a particular State had infringed its international co-operation/assistance obligation towards an individual of another State, another roundtable participant was of the opinion that a complaint concerning international co-operation/assistance could be launched against all States Parties to the *Convention* with the adjudicating body competent to decide what countries the complaint should apply to.

Another participant thought that the ICESCR OP complaints procedure could have a role where a nation was at fault for not properly using resources obtained from a non-domestic source for a particular purpose. If international assistance was not used for the provided purpose, this might be one of the exceptional circumstances in which a Committee public law judicial review type of action might be appropriate.

3. THE ESTABLISHMENT OF AN INTER-SESSIONAL OPEN-ENDED WORKING GROUP ON THE OPTIONAL PROTOCOL PRESENTATION

3.1. *Introductory remarks to Part III of the roundtable by Professor David Harris*.

Professor Harris commenced his introduction with the assessment that States have some reluctance to establish an international ESC rights realisation mechanism that could possibly be used against them. This said, an ICESCR OP working group should be established as it would send an unfavourable message to the world community if States are not prepared to seriously consider establishing a right of communication in respect of ESC rights.

In Professor Harris's opinion, a working group would review the independent experts' report to the Commission of Human Rights and would debate various fundamental issues in an attempt to arrive at State consensus with regard to an OP. Further, the working group would have a wide latitude to reshape the body that investigates ICESCR complaints and could recommend that the Committee or another body be empowered to hear *Covenant* complaints. Within this, another option to consider is that a number of responsibilities could be delegated to specialised agencies that have competence in particular subject areas. Finally, it was stressed that, in engaging a working group, States not in favour of an ICESCR OP outcome would not prevent States that are in favour from at least presenting their views and having the matter debated in a way which does proper justice to a fundamental human rights notion in our society.

3.2. ROUNDTABLE DISCUSSION ON THE ESTABLISHMENT OF AN ICESCR OP WORKING GROUP

(i) ICESCR OP Preparatory Work

One roundtable participant stressed the importance of the independent expert's work as substantive input during this preparatory stage will prove indispensable in laying the groundwork to assist in addressing larger conceptual issues within a working group. Against this backdrop, another participant stressed that States should be given time to both evaluate and respond to Mr. Kotrane's report to the Human Rights Commission and that therefore, a working group should not be established at this time. This opinion led to another comment advising that, as many ICESCR and draft OP questions remain unanswered, preparatory efforts should be furthered in order to ensure that a working group does not start reinventing the wheel. Within this process, it would not be incompatible to combine the work of the independent expert and the establishment of the working group. Here, the independent expert could be entrusted with a two or three year mandate to continue studying the ICESCR and draft OP to formally present his findings at an all States Parties meeting.

(ii) ICESCR OP Working Group

The great majority of roundtable participants voiced support for proceeding to a working group to examine draft OP and ICESCR issues. One participant indicated that although numerous questions remain, the time has come to engage a working group in order that State and civil society representatives may discuss fundamental questions and issues with regard to their legal and political ramifications. Another participant was of the opinion that the most effective way to prompt States Parties to think about draft OP and ICESCR issues is to sit them around a table to negotiate a text. Here, a working group would translate into concrete terms the proposals, theoretical discussions and difficulties concerning this proposed international instrument. In dissent, one participant felt that further understanding of the actual legal interpretation of ESC rights would be necessary before one could comfortably convene a working group to draft the Optional Protocol.

Roundtable participants discussed various options with regard to the framework within which an ICESCR and draft OP working group could press forward. These options included a group that could:

a) meet two or three times per year to discuss various draft OP and ICESCR questions/issues, providing substantive contributions to the creation of an OP without necessarily drafting it;

b) immediately negotiate an OP;

c) review all options available, continue conceptual discussions , (the clarification of obligations and definitions etc.), and at a later stage negotiate an OP.

Finally, one participant acknowledged that as some States are not ready to proceed towards an OP while others are most keen on this issue, the debate should be governed by both respect and understanding and a working group would be a proper forum for every State to share its views and enrich the process.

CONCLUSION

Professor Kotrane concluded the roundtable conference by advising that he gathered valuable impressions and views which will assist him in drafting the report that will be submitted to the Commission of Human Rights at its next session in March 2002. Here, Mr. Kotrane obtained a clearer understanding of the numerous issues surrounding the ICESCR and draft OP and this will serve to move the process forward. In this, the purpose of this conference, to provide a forum for the free exchange of views between State representatives, organisations and experts was satisfied.

APPENDIX "A"

Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Centre de Conférences de Varembé
Rue de Varembé 9-11, Room B,
Geneva, Switzerland

30 November 2001
9h30 to 17h30

AGENDA

Morning Session

Chair: Louise Doswald-Beck, Secretary General, ICJ

9:30 - 10:00 **OPENING OF THE MEETING AND INTRODUCTORY REMARKS**

Professor Hatem Kotrane, UN Independent Expert on the Draft Optional Protocol to the ICESCR

Louise Doswald-Beck, Secretary General, ICJ

10:00-11:15 **ARE THE RIGHTS IN THE COVENANT SUFFICIENTLY PRECISE TO BE THE OBJECT OF A COMPLAINTS PROCEDURE AND TO EVALUATE STATE DISCRETION IN IMPLEMENTATION?**

Introductory remarks by Professor Eibe Riedel, Member of the United Nations Committee on Economic Social and Cultural Rights, Office of the High Commissioner for Human Rights - Professor, Faculty of Law, University of Mannheim, Germany

Roundtable Discussion

11:15-11:30 ***Coffee Break***

11:30-12:15 **Continuation of Roundtable Discussion**

12:15-14:00 ***Lunch Break***

Afternoon Session

Chair: Louise Doswald-Beck, Secretary General, ICJ

14:00-16:00 **WHAT REMEDIES SHOULD THE COMPLAINTS PROCEDURE UTILIZE ?**

Introductory remarks by Professor David Harris, Faculty of Law, University of Nottingham, United Kingdom

Roundtable Discussion

16:00-16:15 ***Coffee break***

16:15-17:15 **IS IT TIME FOR THE ESTABLISHMENT OF AN INTER-SESSIONAL OPEN-ENDED WORKING GROUP ON THE DRAFT OPTIONAL PROTOCOL?**

Introductory remarks by Professor David Harris, Faculty of Law, University of Nottingham, United Kingdom

Roundtable Discussion

17.15-17.30 **FINAL REMARKS AND CLOSE OF MEETING**

Professor Hatem Kotrane, UN Independent Expert on the Draft Optional Protocol to the ICESCR

Louise Doswald-Beck, Secretary General, ICJ

APPENDIX "B"

Background and Objectives of the Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Centre de Conférences de Varembé
Rue de Varembé 9-11, Room B,
Geneva, Switzerland

30 November 2001
9h30 to 17h30

Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Background

Commencing in 1990, the question of adopting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights came under increasing consideration by the international community. Indeed, such an instrument has long been advocated as a means to ensure that on the international level, persons have access to remedial mechanisms in addressing violations against their most basic economic, social and cultural rights. Proponents have pointed out that adoption of an Optional Protocol would permit jurisprudential innovations contributing to an illumination of the normative implications and operational requirements of economic, social and cultural rights. Noting this potential, Mary Robinson, the United Nations High Commissioner for Human Rights, urged the early adoption of such an Optional Protocol and, in the follow-up to the World Summit for Social Development advised that this mechanism would be an invaluable tool for the augmention of economic and social development.

In December of 1996, a Draft Optional Protocol was prepared by the Committee on Economic, Social and Cultural Rights for consideration by the United Nations Commission on Human Rights, (E/CN.4/1997/105). Through its review the Commission made a number of suggestions regarding the draft provisions and both welcomed and called on states for further discussions and commentaries.

In February 1999, the International Commission of Jurists, (ICJ), in cooperation with the Office of the High Commissioner for Human Rights, (OHCHR), organised a workshop in support of a further elaboration to the Draft Optional Protocol. Here, a fruitful discussion occurred amongst 61 State and 11 non-governmental organization representatives with several issues being highlighted for further study and clarification.

During its 56th session, the Commission on Human Rights decided to examine the question of the Draft Optional Protocol through Resolution E/CN.4/2000/9. Here, the High Commissioner was encouraged to strengthen the research and analytical capacities of her office in the field of economic, social and cultural rights and to share her expertise, *inter alia* , through the holding of expert meetings. Subsequently, on 17 August 2000, at its 52nd session, the Sub-Commission on the Promotion and Protection of Human Rights unanimously adopted Resolution (2000/9) (E/CN.4/sub.2/2000/L.11/add.1), requesting that the High Commissioner for Human Rights organise an expert meeting to discuss the Draft Optional Protocol and submit a report summarising the activities of the said meeting to the Commission on Human Rights at its 2001 57th session.

On February 5th and 6th, 2001 the meeting recommended by the Sub-Commission on the Promotion and Protection of Human Rights was held in Geneva where the justiciability of economic, social and cultural rights, with particular reference to the Draft Optional Protocol, was considered. This meeting, in workshop format, was organized by the OHCHR in cooperation with the ICJ. Considering justiciability on the domestic level through case studies covering Mauritius, Colombia, South Africa, Canada, France, and India, the experts demonstrated that economic, social and cultural rights are currently being adjudicated in domestic legal systems throughout the world. It was also pointed out that numerous precedents exist for the international consideration of complaints concerning the violation of economic, social and

cultural rights. Here, the 1995 Additional Protocol to the European Social Charter, the 2000 San Salvador Protocol, the African Charter on Human and Peoples' Rights and the new Optional Protocol to CEDAW served as examples.

A majority of the OHCHR/ICJ workshop participants and experts favoured the view that progress in achieving the adoption of the Draft Optional Protocol is best secured through an inter-sessional open-ended working group of the Commission on Human Rights within which States can debate areas of concern. Here, the high level of government participation in the workshop, 91 representatives from 74 governments, highlighted the international interest in the Draft Optional Protocol and its potential ramifications.

Subsequent to the OHCHR/ICJ workshop, the Commission on Human Rights, through Resolution 2001/30, (E/CN.4/2001/L.11/Add.1), decided to appoint an independent expert to examine the question of the Draft Optional Protocol in light of: the text contained in the annex to document E/CN.4/1997/105; State, intergovernmental organisation and non-governmental organisation comments; and the report of the aforementioned workshop. The appointed expert, Hatem Kotrane, a professor and director of the department of private law at the Faculty of Juridical, Political and Social Sciences, University of Tunis, was requested to submit a report to the Commission at its 58th session with a view to its consideration of possible follow-up and future actions, including the establishment of an open-ended working group of the Commission to examine the question of a Draft Optional Protocol to the ICESCR.

Objectives of the Roundtable

The Roundtable will provide for an open and informal forum, as facilitated by experts, in which States, non-governmental and intergovernmental organizations may engage in a critical exchange directed at working through relevant issues. A provisional agenda is attached.

Organizational Contacts

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APPENDIX "C"

The Draft Optional Protocol to the Intentional Covenant on Economic, Social and Cultural Rights ICESCR: Arguments Favouring Adoption

I. The Promotion of Economic Stability Through the Recognition of ESC Rights

The draft Optional Protocol to the International *Covenant* on Economic Social and Cultural Rights, (hereinafter draft OP), proceeds from the view that the enhancement of human rights is necessary for the simultaneous promotion of domestic and international economic development. Traditionally, economists have argued that governments should allocate goods and services, so-called public goods, characterized by non-rival consumption or positive externalities, that the market could not. Education, environmental protection, the provision of information and safety and security are examples of these public goods whose absence characterizes impoverishment. Indeed, serious economic social and cultural deprivations have been proven throughout history to be significant economic and political destabilizing factors for concerned states. Within this context, development may be viewed as being dependent on economic and social policies that are conducive to the well-being of the population so as to address both market and government failures. The advancement of economic, social and cultural rights, (hereinafter ESC rights), through the draft OP would add to the more widespread attainment of public goods and would thus further economic stability. This approach focuses on problems such as the lack of human dignity and freedom which, if denied, lead to social and economic upheavals.

II. Justiciability

There is a widespread tendency to deem ESC rights as something "other" than civil and political rights as only the latter are perceived as justiciable. Posited as national and or international policy aspirations, ESC rights are thus said to fall below the justiciable threshold for individual legal enforcement. Counter-arguments to the aforementioned theorise that as the ICESCR and the ICCPR are both legally binding human rights instruments of equal power, ESC rights should be positioned on an equal footing with civil and political rights in terms of their justiciability. Here, as has been stressed time and again through numerous United Nations resolutions and pronouncements, if human rights are indeed indivisible, interrelated and interdependent, there is no substantive reason why the monitoring procedures under the ICESCR and the ICCPR should be different. Further, human rights do not derive stature from their justiciability and as such, although the absence of international remedies for ESC rights violations may weaken the full enjoyment of same, this does not derogate from their inherent quality as human rights proper.

That, relative to civil and political rights, ESC rights are less internationally justiciable may be explained through ideologically motivated political and economic arguments that historically contributed to the East vs. West Cold War and presently envelope the North vs. South economic divide. With regard to the latter, present opposition to the draft OP seems, in part, to be informed by the implicit fear of imposing uncontrollable financial burdens upon individual states and the international community.
As will be elaborated upon *infra*, experiences with a wide range of international and domestic ESC rights complaint procedures indicates that there is no basis for fears that the draft OP will result in either an avalanche of complaints or burdensome international/state financial obligations. These fears are especially irrelevant with regard to the draft OP as Article 8 clearly

mandates that State parties retain the final decision as to the substantive measures enacted in response to any views proffered by the Committee on Economic, Social and Cultural Rights, (hereinafter the Committee), regarding the realisation of ESC rights.

II . (a) Complaints Submission on ESC Rights Violations: Current Practice

National and international precedents support the contention that it would neither be new nor innovative for the draft OP to provide for the submission of complaints addressing the violation of ESC rights. For example:

i)Within the Council of Europe, an Optional Protocol to the European Social Charter provides for collective complaints concerning the violation of ESC rights;

ii) Within the Inter-American System, the San Salvador Protocol provides for the submission of individual complaints to the Inter-American Commission and Inter-American Court with regard to trade union/association rights and the right to education;

iii) An Optional Protocol to the *Covenant* on the Elimination of Discrimination Against Women, (hereinafter CEDAW), entered into force on 22 December 2000. This device allows for an individual complaint procedure with respect to the civil, political, economic and cultural rights set forth in the said international instrument. Indeed, in the creation of this Optional Protocol the justiciability issue was debated by State parties however, it was ultimately held to be a non-issue.

iv) Reference to the national and judicial recognition of ESC rights in Mauritius, Colombia, South Africa, Canada, France, and India adds strength to the case for international justiciability of ESC rights through the draft OP.

Bearing the aforementioned in mind, it must be recognized that the draft OP would not create new obligations under the ICESCR, it would simply provide a new mechanism to bring about the substantive realization of the rights previously agreed to by the international community.

II. (b) Vagueness

The most legally technical argument against the international adjudication of ESC rights posits that these rights are vague norms containing unclear state obligations which would render their justiciability problematic.

Countering the normative vagueness argument is the fact that considerable efforts have been made by scholars and the Committee to clarify the content of ESC rights and the obligations they entail. Here, the content of certain rights, *i.e.* the right to food, the right to education, the right to adequate housing and the right to the highest attainable standard of health have been elaborated on through numerous academic studies, reports of independent experts and the General Comments of the Committee. Such clarifications have included:

i) a "minimum threshold" approach to the attainment of ESC rights. This approach aims at establishing a "bottom-line" beneath which concrete State compliance with ESC rights standards should not fall. Here, the minimum threshold is relative to national and or regional benchmarks and serves to assist in the formulation of State policy guidelines in securing domestic ICESCR compliance. The Committee introduced a similar

concept in its General Comment no. 3, namely "the minimum core obligation", being the obligation to ensure the satisfaction of, at the very least, minimum essential levels for each enshrined right;

ii) a typology for the fulfilment of ESC rights satisfaction has been developed in which States should "respect", "protect" and "fulfil" said rights. The obligation to respect requires the State to abstain from actions of commission or omission that violate the integrity of the individual, infringing on his or her freedom, including the freedom to use available material resources in the way the individual deems best to satisfy basic needs. The obligation to protect requires states to implement measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human right of the individual including the infringement on his or her material resources. Here, as far as ESC rights are concerned, States are required to protect individual freedom of action and the use of resources against other subjects. The obligation to fulfil requires the state to take measures necessary to ensure that each person within its jurisdiction is afforded the opportunity to obtain basic need satisfaction, as recognised in human rights instruments which cannot be secured through personal efforts. For example, with regard to the right to food, the obligation to fulfil implies both assistance in order to provide opportunities to obtain food and direct provisions of food or resources which can be accessed when no other possibility exists, due to e.g. unemployment, disadvantage or age, sudden crisis/disaster, or marginalisation. Finally, it must be recognised that, in evaluating individual States' progress towards the substantive fulfilment of *Covenant* based obligations, the Committee does take into account the means available to each state and in this regard accords states a certain "margin of discretion;"

iii) a detailed list of what constitutes violations of ESC rights through acts of commission or omission;

Within the aforementioned context, the draft OP would assist in clarifying the meaning behind and obligations concurrent with ESC rights and their realisation. Further, an international complaint procedure for ESC rights would offer the opportunity to build up a collection of relevant case law in which the justiciability and the content of the rights and state obligations could be further clarified. Finally the draft OP would also permit a more thorough understanding of ESC rights through the examination of specific cases.

III. The Positive and Negative Obligations Stemming From Political, Civil, Economic, Social and Cultural Rights

It is often claimed that ESC rights are "relative rights" with a variable situational content. As the realisation of said rights would require "positive" state action and resources, it is postulated that ESC rights enforcement costs would far exceed costs imposed for the implementation and maintenance of civil and political rights. It is thus often submitted that ESC rights' realisation could only occur progressively. Support for this notion is found in the contention that civil and political rights are absolute and fundamental with invariable content imposing negative state obligations that are satisfied relatively easily.

The above argument is countered by the fact that the implementation and maintenance civil and political rights does require positive state action. Indeed, the reality is that the full realisation of civil and political rights is heavily dependent both on the availability of resources and the development of necessary supportive state/societal structures. Here for example, the right to a

fair trial requires the establishment and maintenance of functioning judicial, law enforcement and penal systems. The European Court of Human Rights supported this contention when it clarified a number of positive state obligations attendant from the civil and political rights under the European *Covenant*. It is thus apparent that the difference in state obligations flowing from civil and political rights as opposed to ESC rights is more a matter of degree rather than a true difference in nature.

Support for the notion that civil and political rights are as "relative" as ESC rights comes from the fact that the scope and content of the former are not self-evident and continue to be the subject of serious interpretative efforts. For example, with regard to the civil and political right to be free from torture, inhumane and degrading treatment, a universally accepted definition regarding the scope and content of this supposed "absolute" right remains elusive.

RECOMMENDATION OF THE INTERNATIONAL COMMISSION OF JURISTS

In view of the growing support among governments and civil society for the adoption of the draft OP, the International Commission of Jurists recommends that further consideration of this international instrument take place through an inter-sessional open-ended Working Group of the Human Rights Commission.

APPENDIX "D"

OVERVIEW OF THE ANALYSIS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS BY THE COMMITTEE

The Obligation "To Take Steps" and "Progressive Achievement"

"undertakes to take steps . . . by all appropriate means, including particularly the adoption of legislative measures"

This article 2, paragraph 1, *Covenant* provision requires all States parties to take measures towards guaranteeing the full enjoyment of all *Covenant* rights for all individuals. The adoption of legislation will, in many cases, be indispensable. In addition the adoption of administrative, economic, financial, educational and social measures, the establishment of action programs, the creation of appropriate bodies and the establishment of judicial procedures may equally be necessary to secure ESC rights, (General Comment no. 3, § 4).

The requirement of "progressive achievement" reflects the fact that full realisation of all ESC rights will generally not be able to be achieved in a short period of time, (General Comment no. 3, § 9). The "progressive obligation" component of the *Covenant* does not mean that only once a State reaches a certain level of economic development must the rights established under the *Covenant* be realised. The duty in question obliges all States parties, notwithstanding their level of national wealth, to move towards the realisation of ESC rights. This clause should thus never be interpreted as allowing States to defer indefinitely efforts to ensure the enjoyment of the rights laid down in the *Covenant*. Certain obligations under the *Covenant* are intended to be implemented immediately. This would apply especially to *Covenant* non-discrimination provisions and the obligation of States parties to respect and protect ESC rights. For the "progressive realisation" of ESC rights, all existing resources must be devoted in the most effective way possible.

Minimum Core Obligation

The Committee has clarified that there is a "minimum core obligation" incumbent on each state to ensure the satisfaction of, at the very least, minimum essential levels for each *Covenant* right. Furthermore, in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all available resources at its disposition in an effort to satisfy, as a matter of priority, said minimum obligations.

The Committee has also emphasised that severe resource constraints cannot justify taking no measures for the weakest groups in society. "[E]ven in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes." (General Comment no. 3, § 12).

Obligation to Respect, Protect and Fulfil

A typology for the fulfilment of ESC rights satisfaction has been developed in which States should "respect", "protect" and "fulfil" said rights.

The obligation to respect requires the State to abstain from actions preventing an individual from using available material resources in the way the individual deems best to satisfy basic needs.

The obligation to protect requires states to implement measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human right of the individual including the infringement on his or her material resources. Here, as far as ESC rights are concerned, States are required to protect individual freedom of action and the use of resources against other subjects.

The obligation to fulfil requires the state to take measures necessary to ensure that each person within its jurisdiction is afforded the opportunity to obtain basic need satisfaction, as recognised in human rights instruments which cannot be secured through personal efforts. For example, with regard to the right to food, the obligation to fulfil implies both assistance in order to provide opportunities to obtain food and direct provisions of food or resources which can be accessed when no other possibility exists, due to e.g. unemployment, disadvantage or age, sudden crisis/disaster, or marginalisation. Finally, it must be recognised that, in evaluating individual States' progress towards the substantive fulfilment of *Covenant* based obligations, the Committee does take into account the means available to each state and in this regard accords states a certain "margin of discretion."

As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations under the *Covenant*.

International Obligations

The question arises whether, apart from the domestic obligations accepted under the *Covenant*, article 2 includes international obligations for State parties, as it mentions that States take steps "individually and through international assistance and co-operation, especially economic and technical". In articles 11 (the right to an adequate standard of living and to the continuous improvement of living conditions), 22 and 23, mention is made again of international co-operation and international measures.

Although during the drafting process it was recognised that developing states would require some form of international assistance, no consensus was reached on the degree of responsibility developed countries would accept in providing such assistance. Therefore, from the *travaux préparatoires* it cannot be deduced that the commitment to international co-operation would imply a legally binding obligation upon States to provide any particular form of assistance.

The Committee has stressed that international co-operation for development and thus for the realisation of ESC rights is an obligation of all States and in particular, it is incumbent upon those States which are in a position to assist others in this regard. (General Comment no. 3, § 14). Here, when making an evaluation, the Committee takes into account the lack of state resources and international assistance/cooperation in support of realising ESC rights.

Non-discrimination and Equality

Non-discrimination and equality are integral elements of the *Covenant*. Article 2, paragraph 2, requires States parties to ensure the provision of judicial review and other recourse procedures should discrimination occur. This provision not only obliges Governments to desist from discriminatory behaviour and to alter laws and practices which allow discrimination, it also applies to the duty of States parties to prohibit private persons and bodies, (third parties), from practising discrimination in any field of public life. Importantly, the grounds of discrimination mentioned in this provision are not exhaustive and thus certain other forms of unfair discrimination negatively affecting the enjoyment of *Covenant* rights, (for instance, discrimination on the basis of sexual orientation), may also be prevented.

APPENDIX "E"

The Committee on Economic, Social and Cultural Rights: Progressing With State Parties Towards the Recognition of Economic, Social and Cultural Rights

Introduction

The primary function of the Committee on Economic, Social and Cultural Rights, (hereinafter the Committee), is to monitor the implementation of *the International Covenant on Economic, Social and Cultural Rights*, (hereinafter *Covenant*) by States. Here, the Committee strives to maintain a constructive dialogue and seeks to determine, through a variety of means, whether or not the norms contained in the *Covenant* are being adequately applied by States and how the implementation and enforcement of this instrument may be improved in order that all people can enjoy *Covenant* enshrined rights.

Drawing on the legal and practical expertise of its members, the Committee examines reports and submissions of States parties and, through concluding observations, provides suggestions and recommendations such that economic, social and cultural rights may be more effectively secured.

The following non-exhaustive examples illustrate the positive effect that both the *Covenant* and Committee suggestions and recommendations may have in influencing various States parties to practically implement their *Covenant*-based obligations.

Canada

In keeping with Committee recommendations, the Federal Government reinstated the Court Challenges Program which provides funding for Constitutional test cases promoting the rights of official language minorities and equality-seeking groups. See document no.: E/1994/104/Add.17, State Party Third Periodic Report: Canada, 20/01/98.

Cyprus

Most of the economic, social and cultural rights embodied in *Part II* of the *Covenant* are now safeguarded by the *Constitution of Cyprus*. Further, the *Covenant* forms part of the municipal law of Cyprus and has thus acquired superior force to any other municipal law. See document no.: E/1994/104/Add.12, State Party Third Periodic Report: Cyprus, 06/06/96.

Egypt

The Constitutional Court of Egypt invoked the provisions of the *Covenant* to acquit rail workers who were prosecuted for going on strike in 1986 and declared that the Penal Code should be amended to allow the right to strike. See document no.: E/C.12/1/Add.44, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, 23/05/2000.

Finland

In keeping with Committee recommendations, an important legislative initiative was introduced whereby provisions relating to principal economic, social and cultural rights were incorporated into the Constitution of Finland. In June 1999, these fundamental rights provisions were transferred nearly unaltered from the *Covenant* to the Constitution, becoming effective on 1 March 2000. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99.

Committee recommendations may have also assisted in ensuring that human rights issues are one of the standard subject matters in judges' further training courses which have included economic, social and cultural rights and the administration of justice. Further, in 1995, a separate fundamental rights and human rights section comprising the texts of the principal human rights agreements was included in the Laws of Finland. Prior to this innovation, international agreements ratified by Finland were published only in a separate Treaty Series of the Statute Book. Thanks to this change, it has become easier for both civil servants and lawyers to take note in their work of human rights agreements which are a part of legislation applied in Finland. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99.

Also in keeping with Committee recommendations, The Ministry of Labour has undertaken to develop the principle of gender mainstreaming in its own branch of the administration, particularly in its employment policy. The gender perspective is taken into account, for example, in the development of labour legislation, vocational guidance and projects related to the European Union (EU) structural funds. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99.

Finally, the Committee recommended that Finland consider the introduction of a general minimum wage system which would also cover employees who are not protected by collective agreements. In response, a Finish Tripartite Contracts of Employment Act Committee is currently preparing a proposal for a general reform of the *Contracts of Employment Act*. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99..

Germany

Germany is at present actively promoting economic, social and cultural rights both nationally and internationally through recent positive developments concerning said rights, such as: the March 2001 consultation organized by the State on the right to food; the State party's efforts at the United Nations Commission on Human Rights to establish the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; and its revised and more favourable position on a draft Optional Protocol to the *Covenant*. See document no.: E/1994/104/Add.14, State Party Third Periodic Report: Germany, 17/10/96.

In keeping with Committee recommendations, departing from its previous practice, the Federal Government involved the NGO forum "World Summit for Social Development" in the preparation for its fourth periodic report to the Committee on the implementation of the *Covenant*. See document no.: E/1994/104/Add.14, State Party Third Periodic Report: Germany, 17/10/96.

Finally, the reintroduction of the continuation of full wage payments in the event of sickness announced in November 1998 is mentioned as a positive example of the new Federal

Government's policy to implement *Covenant* obligations. See document no.: E/1994/104/Add.14, State Party Third Periodic Report: Germany, 17/10/96.

Portugal

Portugal has extended efforts to implement Committee recommendations in particular through legislative measures to promote equality between men and women. See document no.: E/1990/6/Add.6, State Party Second Periodic Report: Portugal, 22/07/94.

Sweden

In its concluding observations the Committee expressed its concern over the problem of child pornography and the lack of information on this issue in Sweeden. It urged the government to intensify its efforts to combat child pornography and increase measures for monitoring and the registration of all such cases. It also referred to the need to ensure that appropriate penalties are imposed for such offences. Further to Committee recommendations, on 1 January 1999, new Swedish legislation extending criminal liability for association with child pornography came into force. Here, virtually all association with child pornography images, including possession, constitutes a criminal offence. The legislation applies to media of all kinds including the electronic environment. See document no.: E/C.12/4/Add.4, State Party Fourth Periodic Report: Sweden, 08/08/2000.

Tunisia

Many new laws and modifications of existing laws were inspired by the obligations assumed under the *Covenant* as the enshrined rights form part of Tunisian law by virtue of the Constitutional provision that an international treaty ratified by Tunisia becomes part of domestic law. See document no.: E/C.12/1/Add.36, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Tunisia, 14/05/99.

APPENDIX "F"

Committee for Economic, Social and Cultural Rights: Summary of General Comments One Through Fourteen

General Comment 1 - Reporting by States Parties - Part IV, ICESCR

General Comment 1 advises that the ICESCR State reporting obligations are designed to assist nations in fulfilling their *Covenant* obligations and to provide a basis on which *Covenant* compliance can be monitored in the aim of procuring the substantive fulfillment of economic, social and cultural rights, (hereinafter ESC rights). Further, State reporting mandates that comprehensive reviews are undertaken with respect to national legislation and administrative rules/procedures/practice. Coupled with the result of opening government ESC rights policies to public scrutiny, State reports should also provide a basis on which nations, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of *Covenant* obligations. This in turn will enable the aforementioned parties to facilitate an exchange of information so as to develop a better understanding of the individual domestic and common problems faced by States and measures that might promote ESC right realization.

General Comment 2 - International Technical Assistance Measures - Art. 22, ICESCR

General Comment 2 advises that article 22 of the ICESCR establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies, any matters arising out of State reports submitted under the *Covenant* "which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the ... *Covenant*" which could lead either to general or specific recommendations in addressing pertinent ESC rights realization issues. General Comment 2 thus recognizes that civil, political, economic, social and cultural rights are indivisible and interdependent and therefore efforts to promote one set of rights should also take full account of related human rights. Further, recognition is given to the importance of integrating human rights concerns into development activities and the intimate relationship that should be established between development activities and efforts to promote respect for human rights in general, and ESC rights in particular.

Comment 3 - The Nature of States Parties Obligations - Art. 2, ICESCR

General comment 3 advises that the *Covenant* provides for the progressive realization of ESC rights within the context of the constraints placed on States due to the limits of available resources. Despite these constraints however, the *Covenant* imposes various obligations which are of immediate effect to bring about ESC rights realization. Of these, two are of particular importance: the "undertaking to guarantee" that relevant rights "will be exercised without discrimination" and the undertaking in article 2(1) "to take steps". The concept of progressive realization is not to be misinterpreted as depriving *Covenant* obligations of all meaningful content as ESC rights realization objectives were designed to be flexible, reflecting the realities of the real world and attendant difficulties involved for countries in ensuring the full realization of said rights. The progressive realization concept thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Steps to bring about the full realization of ESC rights should be deliberate, concrete and targeted as clearly as possible

towards meeting the obligations recognized in the *Covenant*. States should use "all appropriate means, which include but are not limited to: the adoption of legislative measures; judicial remedies for ESC rights violations; and appropriate administrative, financial, educational and social measures. Finally, General Comment 3 advises that there exists a minimum core obligation for States to ensure the satisfaction of, at the very least, minimum essential levels of each *Covenant* right that should be achieved with individual state and international assistance and cooperation.

General Comment 4 - The Right to Adequate Housing - Art. 11(1), ICESCR

General Comment 4 advises that the human right to adequate housing, as derived from the right to an adequate standard of living, is of central importance for the enjoyment of all ESC rights and cannot be viewed in isolation from other human rights contained in the ICSECR, the ICCPR and other applicable international instruments. Here, the right to housing should not be interpreted in a narrow or restrictive sense but rather it should be seen as the right to live somewhere in security, peace and dignity, the concept of adequacy being particularly significant in relation to this right. Certain aspects of the right to housing that must be taken into account in any particular context are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

Regardless of the state of development of any given nation, General Comment 4 advises that certain immediate steps should be taken to promote the right to housing, the most important of which would require the abstention by Governments from certain negative housing practices. This abstention should be coupled with a commitment to the facilitation of self-help measures directed at social groups living in the most unfavourable conditions. The aforementioned will almost invariably require the adoption of a national housing strategy which "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals, the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of necessary measures". Within this, General Comment 4 advises that there exists a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of adequate housing incumbent upon every State and that this should be secured through individual state efforts and international cooperation.

General Comment 5 - Persons with Disabilities

General Comment 5 advises that *Covenant* provisions apply to persons with disabilities as this instrument applies fully to "all" members of society. The obligation of States towards this group is to take positive action to reduce public/private sector structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required. Methods to be used by States in seeking to implement their obligations under the *Covenant* towards persons with disabilities include: the need to ascertain, through regular monitoring, the nature and scope of the problems currently faced by persons with disabilities; the need to adopt appropriately tailored policies and programs to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or, where necessary, seek international cooperation and assistance. Here, policy-making and program implementation should be undertaken on the basis of close consultation with, and the involvement of representative groups of the persons concerned. In the case of persons with

disabilities, everything possible should be done to enable such persons, when they so wish, to live with their families, maintain employment, obtain medical care/support services, have access to adequate food, accessible housing, basic material needs and the benefits of scientific progress and its applications.

General Comment 6 - The Economic, Social and Cultural Rights of Older Persons

General Comment 6 advises that the *Covenant* applies to the elderly through analogy with "the right of everyone to social security, including social insurance" and through the fact that the *Covenant's* provisions apply fully to "all" members of society. This General Comment notes that State parties to the *Covenant* are obligated to pay particular attention to the promotion and protection of the ESC rights of older persons as they are an extremely vulnerable group. The methods States are to employ in fulfilling the obligations they have assumed under the *Covenant* in respect of older persons are basically the same as those for the fulfillment of other obligations and include: the need to determine the nature and scope of the problems faced by the elderly through regular monitoring; the need to adopt properly designed policies and programs to meet targeted deficiencies; the need to enact legislation when necessary and to eliminate any discriminatory legislation; and the need to ensure the relevant budgetary support or, as appropriate, to request international cooperation. Finally, General Comment 6 advises that States must take appropriate steps to safeguard the rights of the aged to: employment and safe working conditions until their retirement; social security; family access and support; an adequate standard of living; access to proper medical care; education; and access the benefits of scientific progress and its applications.

General Comment 7 - The Right to Adequate Housing: Forced Evictions - Art. 11.1, ICESCR

General Comment 7 advises that forced evictions are *prima facie* incompatible with the *Covenant* as all persons should possess a degree of security of domicile tenure which guarantees legal protection against evictions, harassment and other threats. States must refrain from this practice and ensure that the law is enforced against agents or third parties who carry out forced evictions. Legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which provide the greatest possible security of tenure to occupiers of houses/land and are designed to strictly control the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Particular care should be taken with regard to women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups who all suffer disproportionately from the practice of forced evictions. Finally, where there are forced evictions which result in homelessness, General Comment 7 advises that States must take all appropriate measures, to the maximum of available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

General Comment 8 - The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights

General Comment 8 recognizes that economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally. It advises that no matter the circumstances, such sanctions should always take full account of the provisions of the *Covenant*. In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. General Comment 7 further advises that two sets of obligations flow from these considerations. First, the State affected by the imposition of sanctions must not nullify or diminish its relevant obligations under the *Covenant*. Second, the party or parties responsible for the imposition, maintenance or implementation of sanctions must take fully take ESC rights into account when designing an appropriate sanctions regime. Further, effective monitoring, which is always required under the terms of the *Covenant*, should be undertaken throughout the period that sanctions are in force. Finally, the sanction imposing body/bodies have an obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

General Comment 9 - The Domestic Application of the Covenant

General Comment 9 advises that the central obligation in relation to the *Covenant* is for States parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the *Covenant* adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account. This flexibility however, coexists with the obligation upon each State party to use all means at its disposal to give effect to *Covenant* rights. Here, States should modify their domestic legal orders as necessary to both give effect to their treaty obligations and to provide effective domestic judicial remedies for violations of ESC rights. Whatever the preferred methodology for domestic implementation, several principles follow from the duty to give effect to the *Covenant* and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfillment of *Covenant* obligations. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Third, while the *Covenant* does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable.

General Comment 10 - The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights

Article 2, para. 1, of the *Covenant* obligates each State party "to take steps ... with a view to achieving progressively the full realization of the (*Covenant*) rights ... by all appropriate means". General Comment 10 advises that one of the means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights. Here, it is acknowledged that national human rights institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. The types of activities that can be undertaken in relation to these rights are said to be: (a) the promotion of educational and information programs designed to enhance awareness and understanding of ESC rights; (b) the scrutinizing of existing laws and administrative acts, as well as draft Bills and

other proposals to ensure that they are consistent with the requirements of the *Covenant*; (c) the provision of technical advice; (d) the identification of national-level benchmarks against which the realization of *Covenant* obligations can be measured; (e) conducting research to ascertain the extent to which particular ESC rights are being realized, (f) monitoring compliance with specific *Covenant* rights; and (g) the examination of complaints alleging infringements of applicable ESC rights standards within States.

General Comment 11 - Plans of Action for Primary Education - Art. 14, ICESCR

Article 14 of the ICESCR requires each State party which has not been able to secure compulsory primary education, free of charge, to work out and adopt, within two years, a detailed plan of action for the progressive implementation, within a reasonable number of years of the principle of compulsory primary education free of charge for all. General Comment 11 deems this right as being one of vital. State plans to implement compulsory primary education, free of charge to all, must specifically set out a series of targeted implementation dates for exchange of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question.

International assistance and cooperation and action are of particular relevance in this situation as where a State party is clearly lacking the financial resources and/or expertise required to "work out and adopt a detailed plan, the international community has a clear obligation to assist.

General Comment 12 - The Right to Adequate Food - Art. 11, ICESCR

General Comment 12 affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels. The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or the means for its procurement. It shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and/or other specific nutrients. General Comment 12 proceeds to note that the right to adequate food will have to be realized progressively. This imposes an obligation to move as expeditiously as possible towards that goal. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger even in times of natural or other disasters. The core content of the right to adequate food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time frame for the implementation of necessary measures and States should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food. Especially for this right, international assistance is a priority as States have a joint and individual responsibility to cooperate in providing assistance in accordance with ability.

General Comment 13 - The Right to Education - Art. 13 and Art. 14, ICESCR

General Comment 13 advises that education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. It plays a vital role in empowering women, safeguarding children from exploitative and/or hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. This said, the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence. While the precise and appropriate application of the terms will depend upon the conditions prevailing in each particular State, General Comment 13 advises that education in all its forms and at all levels should exhibit the following interrelated and essential features: availability; accessibility; acceptability; and adaptability. Here, the progressive introduction of free education means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. Finally, the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.

General Comment 14 - The Right to the Highest Attainable Standard of Health - Art. 12 ICESCR

General Comment 14 advises that health is a fundamental human right indispensable for the exercise of other human rights. The realization of the right to health may be pursued through numerous complementary approaches, such as the formulation of health policies, or the implementation of health programs developed by the World Health Organization, (WHO), or the adoption of specific legal instruments. Here, the right to health is closely related to and dependent upon the realization of other human rights. The notion of "the highest attainable standard of health takes into account both the individual's biological and socioeconomic preconditions and a State's available resources. General Comment 14 interprets the right to health as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and drinkable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including information on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in particular States: availability; accessibility; acceptability; and quality.

State parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind and the obligation to take steps towards full right realization. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health. Here, States have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the *Covenant*, including essential primary health care.

APPENDIX "G"

The Protection of Economic Social and Cultural Rights: South African Judicial Interpretations

Soobramoney v. *Minister of Health, KwaZulu-Natal*, 1997 (12) BCLR 1696 (CC)

Facts

Mr. Soobramoney suffered from diabetes, heart disease and chronic renal failure which necessitated regular medical/mechanical dialysis in order to prolong his life. Compelled to seek treatment for his incurable condition from a public hospital, the moving party's medical needs were refused as budgetary constraints forced the hospital to only provide dialysis treatments to individuals whose condition could be remedied in a short period of time. Against this, the appellant sought the intercession of the Constitutional Court asserting that his constitutionally guaranteed, s.11, right to life and, s.27(3), right to emergency medical treatment, had been violated.

Judgment

The key question appealed to the Constitutional Court was whether the constitutionally enshrined rights to life and emergency medical treatment placed a positive obligation on the State to provide same for the appellant. Here, the Court, per Chaskalson P., sympathised with Mr. Soobramoney's situation however, a "chronic lack of resources" was cited as support for the finding that there was no unqualified State obligation to meet the appellant's medical requirements. The Court thus held that as South Africa was experiencing a severe shortage of medical supplies and personnel, only immediate emergency treatment could be expected as of right.

Government of the Republic of South Africa v. *Grootboom*, 2000 (11) BCLR 1169 (CC)

Facts

Irene Grootboom was one of a group of 390 adults and 510 children living under appalling conditions in a South African shanty-town settlement. Illegally occupying land ear-marked for low-cost housing, the State forcibly evicted the "Grootboom group" and bulldozed their primitive domiciles. Prior to this, many of the inhabitants had applied for subsidised low-cost housing and had been on a waiting list for up to seven years. Petitioning the High Court, Irene Grootboom sought State supplied basic shelter on behalf of her 800 member squatter society basing her argument on South African constitutional rights, s.26(2), access to housing, and s.28(1)(c), a child's right to shelter.

Judgment

The key question appealed to the Constitutional Court was whether the constitutionally enshrined housing and shelter rights placed a positive obligation on the State to provide same for the petitioners. The facts of this case presented the Constitutional Court with a very difficult choice: to approve the illegal occupation of land by homeless people, or to ratify the inaction of the Government to deal with the issue of homelessness. On October 4, 2000 the Court per Yacoob J. held that the South African government was positively obliged to ameliorate the conditions faced by the Grootboom group through the provision of basic housing. This result was arrived at through the finding that State indigent population housing policies were unreasonable. In determining the 'reasonableness' of said policies, the Court decided that while limited State resources were an important factor, in the instant case the State had a duty to address the needs of the most vulnerable members of society. Thus, in the context of the right of access to housing, the Court held that State policy, in order to be reasonable, had to take account of the different socio-economic levels of the South African population and could not ignore those whose needs were most urgent. In conclusion, the Constitutional Court declared that the comprehensive housing programme called for by section 26(2) of the Constitution, had to include measures "to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations."

APPENDIX "H"

CONFERENCE PARTICIPANTS

Experts

Professor David Harris, University of Nottingham Faculty of Law, United Kingdom

Mr. Hatem Kotrane, Independent Expert on the ICESCR, appointed by the United Nations Commission on Human Rights

Professor Eibe Riedel, United Nations Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights

Mr. Philippe Texier, United Nations Committee on Economic, Social and Cultural Rights

State Representatives

Ms. Holla Bachtobji, Permanent Mission of Tunisia to the United Nations and other international organisations in Geneva

Mr. Mohamed Berrah, Permanent Mission of Algeria to the United Nations and other international organisations in Geneva

Ms. Deborah Chatsis, Permanent Mission of Canada to the United Nations and other international organisations in Geneva

Mr. Ignacio de Palacio Espana, Permanent Mission of Spain to the United Nations and other international organisations in Geneva

Mr. Robert Dieter, Permanent Mission of Germany to the United Nations and other international organisations in Geneva

Mr. Alexandre Pena Ghisleni, Permanent Mission of Brazil to the United Nations and other international organisations in Geneva

Minister Arturo Hernandez Basave, Permanent Mission of Mexico to the United Nations and other international organisations in Geneva

Ambassador Alexandre Kavsadze, Permanent Mission of the Republic of Georgia to the United Nations and other international organisations in Geneva

Mr. Vesna Kos, Permanent Mission of the Republic of Croatia to the United Nations and other international organisations in Geneva

Mr. Arto Kosonen, Ministry of Foreign Affairs of Finland

Ms. Susan Mc Crory, Permanent Mission of the United Kingdom to the United Nations and other international organisations in Geneva

Mr. Hervé Magro, Permanent Mission of France to the United Nations and other international organisations in Geneva

Mr. Luis Filipe Faro Ramos, Permanent Mission of Portugal to the United Nations and other international organisations in Geneva

Ms. Peter Rothen, Permanent Mission of Germany to the United Nations and other international organisations in Geneva

Ms. Ivana Schellongova, Permanent Mission of the Czech Republic to the United Nations and other international organisations in Geneva

Mr. Sergiusz Sidorowicz, Permanent Mission of the Republic of Poland to the United Nations and other international organisations in Geneva

Mr. José Valencia, Permanent Mission of Ecuador to the United Nations and other international organisations in Geneva

United Nations Office of the High Commissioner for Human Rights

Ms. Kitty Arambulo, United Nations Office of the High Commissioner for Human Rights

Ms. Dutima Bhagwandin, United Nations Office of the High Commissioner for Human Rights

Ms. Maria-Luisa Silva Mejias, United Nations Office of the High Commissioner for Human Rights

Non-Governmental Organisations attending as Observers

Ms. Danielle Babinault, Terre des Hommes, France

Ms. Marie-Thérese Bellamy, International Confederation of Free Trade Unions, Switzerland

Professor Berma Klein Goldewijk, Centre For Dignity and Rights International, Netherlands

Mr. Bruno Hérin, Terre des Hommes, France

Mr. Davinder Lamba, Mazingira Institute / Habitat International Coalition, Kenya

Malcolm Langford, Centre on Housing Rights and Evictions, Switzerland

Mr. Mikel Mancisidor, Paz y Tercer Mundo, Spain

Mr. Benoit Narbey, International Federation for Human Rights, Switzerland

International Commission of Jurists

Mr. Adrian Arena
Mr. Edwin Berry
Ms. Louise Doswald-Beck

Representatives from the following invited States were unable to attend the roundtable:

Chile; India; Mauritius; Netherlands; Peoples Republic of China, Philippines; Republic of Kenya; Republic of Senegal; Republic of Uruguay; Russian Federation; South Africa; Thailand.

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COMMISSION ON HUMAN RIGHTS
Fifty-eighth session
Agenda item 11

CIVIL AND POLITICAL RIGHTS

Note verbale dated 22 March 2002 from the Permanent Mission of the Sudan to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights

The Permanent Mission of the Republic of the Sudan to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commission for Human Rights and has the honour to enclose herewith Presidential Decree No. (14) 2002 for the re-establishment of the Committee for the Eradication of Abduction of Women and Children (CEAWC). This decree revitalizes CEAWC by giving it additional powers to act more vigorously under the direct supervision of the Presidency.

The Permanent Mission of the Sudan will be most grateful if the Office of the High Commissioner for Human Rights will circulate this text* as an official document of the fifty-eighth session of the Commission on Human Rights in the context of the agenda item on the implementation of civil and political rights.

* Reproduced as received, in English only.

GE.02-12159 (E) 030402

Annex

بسم الله الرحمن الرحيم

The Presidency of the Republic

Presidential Decree No (14) /2002 for the Re- establishment of the Committee for the Eradication of Abduction of Women and Children (CEAWC)

The President of the Republic,

Having considered the Decree of the Minister of Justice establishing the Committee for the Eradication of Abduction of Women and Children, and in exercise of the powers conferred upon him by Article (43) of the Constitution, issued the following Decree: -

Title and Commencement

1. This Decree shall be cited as the "Decree for the Re-establishment of the Committee for the Eradication of Abduction of Women and Children (CEAWC), 2002" and it shall come into force as of the date of signature.

Reestablishment of CEAWC and Patronage

2. (1) The Committee for Eradication of Abduction of Women and Children shall be re-established as follows:-
   - (a) Full-time Chairman, a prominent figure to be appointed by the President of the Republic.
   - (b) The Minister of Social and Cultural Affairs, South Darfur State (co-Chairman).
   - (c) The Minister of Social and Cultural Affairs, West Kordofan State (co-Chairman).
   - (d) Full-time Administration and Finance Director to be appointed by the Chairman of (CEAWC)..... member
   - (e) Umda/ James Aguer, Chairman of the Dinka Committee..... member
   - (f) Sayed/ Mohammed Omer ELAnsari ..... member
   - (g) Sayed/ Sayeed Senien Mosa Madibu..... member
   - (h) Part-time members representing relevant State institutions to be designated by the Chairman of CEAWC in consultation with the Heads of their Institutions.
   - (i) Members representing the civil society and NGOs to be designated by the Chairman of CEAWC in consultation with their organizations.

(2) The Chairman of CEAWC may call upon any person to help him in the execution of his mandate.

(3) CEAWC shall work under the patronage of the President of the Republic.

Secretariat-General

3. (a) CEAWC shall have a Secretariat - General composed of the Chairman, the two co-Chairmen, the Administration and Finance Director, the full-time legal counsels and full-time employees designated by the relevant Government institutions or by the Chairman in consultation with the Heads of their Institutions.
   (b) The Secretariat-General is mandated to run the daily work, prepare and submit the budget for approval and authorize expenditure.

Mandate of CEAWC

4. CEAWC is mandated to:

   (1) Ensure the save return of abducted women and children to their families.
   (2) Provide the necessary support to the concerned tribal leaders to assist in the eradication of the phenomenon of abduction of women and children.
   (3) Investigate reports alleging the occurrence of abduction of women and children.
   (4) Prosecute and refer to trial any persons suspected of committing, supporting or participating in the abduction of women and children.
   (5) Investigate the root-causes of abduction of womenand children and the subjection of abductees to forced labour.
   (6) Recommend, for the President of the Republic, the measures and modalities required for the eradication of the phenomenon of abduction of women and children.
   (7) Coordinate with concerned international, regional and voluntary organizations to achieve its objectives.

Powers of the Chairman

5. (1) The Chairman of CEAWC shall have all the necessary powers to fulfil the mandate and objectives of CEAWC.
   (2) Without prejudice to the generality of the preceding paragraph, the Chairman of CEAWC shall have the following powers:
      (a) The powers delegated by the Minister of Justice to enable the Chairman to fulfil his mandate, and refer cases having criminal dimension to trial.
      (b) All financial, administrative, and technical powers necessary for his mandate.

State CEAWCs

6. (1) The Governor of the concerned State shall establish a committee for the eradication of abduction of women and children at the State level, having

as members employees responsible for prosecution, armed forces, police forces, internal security and a representative of the State government.

(2) The Governor of each State may establish similar committees at the province level chaired by the relevant Commissioner.

(3) The Governor of each concerned State shall, whenever he deems necessary, establish committees composed of representatives of the native administration in the State to undertake the documentation of cases of abduction of women and children and ensure the return of abductees to their families.

Resuorces, Accounts and Auditing

7. (1) The financial resources of CEAWC are as follows: -
   (a) Government funding.
   (b) National and international grants and donations.
   (2) The funds of CEAWC shall be deposited with Bank of Sudan, and shall be spent in accordance with the approved finance and accounting procedures.
   (3) The Auditor-General Chamber shall audit the accounts of CEAWC.

Venue

8. The venue of CEAWC shall be in the State of Khartoum.

Duration and Reports

9. (1) CEAWC shall conclude its work within one year.
   (2) The Chairman of CEAWC shall submit monthly reports and a final report to the President of the Republic.

Facilitation of the work of CEAWC

10. All State institutions shall support CEAWC and facilitate its work.

Issued under my signature on the 13th dayof Thelkeda 1422, being the 26th day of January 2002.

Luetinant – General

Omer Hassan Ahmed EL Basheer
President of the Republic

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Fifty-eighth session
Agenda item 11 (e)

CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF RELIGIOUS INTOLERANCE

Note verbale dated 22 March 2002 from the Permanent Mission of the Sudan to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights

The Permanent Mission of the Republic of the Sudan to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to inform it that the Sudanese Cabinet of Ministers decided at its ordinary session No. 1 of 2001 held on 7 January 2001 that the Ministry of the Interior, in coordination with the Ministry of Foreign Affairs, the Ministry of Tourism and Culture and the security authorities, would guarantee aliens the freedom to travel to any part of the Sudan with the exception of military operational areas.

The Permanent Mission would be most grateful if the Office of the United Nations High Commissioner for Human Rights would circulate this text* as an official document of the fifty-eighth session of the Commission on Human Rights in the context of the agenda item on implementation of religious freedoms.

* The annex is reproduced as received in the language of submission and in English only.

Annex

THE REPUBLIC OF THE SUDAN

Council of Ministers

Office of the Minister

Date: 20 Shawwal 1421 A.H.

Corresponding to: 15 January 2001

Subject: Instructions from the distinguished Cabinet of Ministers

"Peace and the Mercy and Blessings of Almighty God be upon you."

Brothers, please note that the distinguished Cabinet of Ministers, at its session No. 1 of 2001 held on 13 Shawwal 1421 A.H. and corresponding to 7 January 2001, decided that the Ministry of the Interior, in coordination with the Ministries of Foreign Affairs, the Environment and Tourism and the security authorities, will guarantee aliens the freedom to travel to any part of the country with the exception of the excluded (operational) areas.

We request that you take such measures as are necessary to implement the above-mentioned instructions.

"God knows the purpose and he leads the way."

(Signed) General Abd al-Rahman Sirr al-Khatim
Minister of Cabinet Affairs

The Minister of the Interior
cc: The Minister of Foreign Affairs
The Minister of the Environment and Tourism
Advisor to the President on Security Affairs

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COMMISSION ON HUMAN RIGHTS
Fifty-eighth session
Agenda item 9

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Note verbale dated 26 March 2002 from the Permanent Mission of Armenia to the United Nations Office at Geneva addressed to the secretariat of the fifty-eighth session of the Commission on Human Rights

The Permanent Mission of the Republic of Armenia to the United Nations Office and Other International Organizations at Geneva presents its compliments to the secretariat of the Commission on Human Rights and has the honour to request the circulation of the attached* information as an official document of the fifty-eighth session of the Commission under agenda item 9, "Question of the violation of human rights and fundamental freedoms in any part of the world".

* Reproduced as received, in English only.

GE.02-12124 (E) 030402

Annex

The truth about the events in Khojaly

Evidence from Azerbaijani sources

For nine years after the events in Khojaly official Baku has been obstinately fanning anti-Armenian hysteria with the aim of falsifying the real events and discrediting the Armenian people in the eyes of the international community.

The events in Khojaly, which led to the deaths of civilians, were the result solely of political intrigues and a struggle for power in Azerbaijan.

The real reasons are most convincingly reflected in the accounts of Azerbaijanis themselves - as participants in and eyewitnesses of what happened - as well as of those who know the whole inside story to the events in Baku.

According to Azerbaijani journalist M. Safarogly, "Khojaly occupied an important strategic position. The loss of Khojaly was a political fiasco for Mutalibov".[1]

Khojaly, along with Shusha and Agdam, was one of the main strongholds from which Stepanakert, the capital of the Nagorny Karabakh Republic, was shelled continuously and mercilessly for three winter months using artillery and missiles and launchers for targeting cities.

Knocking out the weapon emplacements in Khojaly and freeing the airport were the only way for the inhabitants of the Nagorny Karabakh Republic to ensure the physical survival of a population condemned by Azerbaijan to complete annihilation. The daily shelling of Stepanakert from nearby Khojaly took the lives of hundreds of peaceful inhabitants - women, children and old people.

Former President of Azerbaijan, Ayaz Mutalibov, has emphasized that "... the assault on Khojaly was not a surprise attack".[2] In a "Nezavisimaya gazeta" newspaper interview he stated that "a corridor was kept open by the Armenians for people to leave".[3] However, a column of civilians was fired on by armed units of the Popular Front of Azerbaijan on the approaches to the Agdam district border, a fact later confirmed by Ayaz Mutalibov, who linked this criminal act to attempts by the opposition to remove him from power, and blamed it entirely for what happened.

In his recent interview with the "Novoye vremya" magazine, Mutalibov confirms his statement of nine years ago: "The shooting of the Khojaly residents was obviously organized by someone to take control in Azerbaijan".[4]

Similar comments and views concerning the events in Khojaly are known to have been made by several other highly-placed Azerbaijani officials and journalists.

There is, moreover, the conclusion of Azerbaijani journalist Arif Yunusov, which differs somewhat from the previous statements: "The town and its inhabitants were deliberately sacrificed for a political purpose - to prevent the Popular Front of Azerbaijan from coming to power".[5] In this case, though, the Azerbaijanis themselves are named as the perpetrators of the tragedy.

What resulted from the betrayal of the inhabitants of Khojaly by their own highly-placed compatriots is well known. Azerbaijani propaganda has railed to the whole world about the "atrocities of the Armenians", supplying television stations with horrendous pictures of a field strewn with mutilated bodies. Khojaly is claimed to have been "the Armenians' revenge for Sumgait".

Tamerlan Karayev, at one time Chairman of the Supreme Council of the Azerbaijan Republic, bears witness: "The tragedy was committed by the authorities of Azerbaijan", and specifically by "someone highly placed".[6]

The Czech journalist Jana Mazalova, who by an oversight of the Azerbaijanis was included in both of the groups of press representatives to be shown the "bodies mutilated by the Armenians", noted a substantial difference in the two cases. When she went to the scene immediately after the events, Mazalova did not see any traces of barbarous treatment of the bodies. Yet a couple of days later the journalists were shown disfigured bodies already "prepared" for pictures.

Who killed the peaceful inhabitants of Khojaly and then mutilated their bodies, if the tragedy occurred not in a village taken by Armenians or on the route of the humanitarian corridor, but on the approaches to the town of Agdam - on territory fully controlled by the Popular Front of Azerbaijan?

The independent Azerbaijani cameraman Chingiz Mustafayev, who took pictures on 28 February and 2 March 1992, had doubts about the official Azerbaijani version and began his own inquiry. The journalist's very first report to the Moscow news agency "D-press" on the possible complicity of the Azerbaijani side in the crimes cost Mustafayev his life: he was killed not far from Agdam, under circumstances that are still unexplained.

The current President of Azerbaijan, Heydar Aliyev, himself recognized that Azerbaijan's "former leadership were also guilty" of the events in Khojaly. Already in

April 1992, according to the agency Bilik-Dunyasy, he had commented as follows: "The bloodshed will be to our advantage. We should not interfere in the course of events". To whose "advantage" was the bloodletting is clear to everyone. "Megapolis-Express" wrote: "It cannot be denied that if the Popular Front of Azerbaijan actually set far-reaching objectives, they have been achieved. Mutalibov has been compromised and overthrown, public opinion worldwide has been shaken, and the Azerbaijanis and their Turkish brethren have believed in the so-called "genocide of the Azerbaijani people in Khojaly".[7]

One other tragic detail. It has become clear since the events that 47 Armenian hostages were already being held on 26 February in "peaceful" Khojaly, a fact that the Azerbaijani mass media "covering" the tragedy have failed to mention. After the liberation of Khojaly only 13 hostages (including 6 women and 1 child) were found there, the other 34 having been taken away by the Azerbaijanis to an unknown location. The only thing known about them is that they were led from the village on the night of the operation, but never reached Agdam. There is still no information concerning what eventually happened to them or confirming that they continued to be held captive by the Azerbaijanis.

Obviously, those who wanted to create the impression that bodies had been mutilated by the Armenians first of all disfigured the bodies of those same Armenian hostages, in order to make it impossible to identify them. Precisely for that purpose the outer clothing was removed from many of the bodies, and precisely for that reason the bodies of the unfortunate victims were damaged so badly that they became unrecognizable.

In the light of the above facts it may confidently be said that the killing of peaceful inhabitants of the village of Khojaly and of the Armenian hostages being held there was the work of the Azerbaijani side, which committed this crime against its own people in the name of political intrigues and the struggle for power.

Notes

[1] "Nezavisimaya gazeta" newspaper, February 1993.

[2] "Ogonek" magazine, Nos. 14-15, 1992.

[3] "Nezavisimaya gazeta" newspaper, 2 April 1992.

[4] "Novoye vremya" newspaper, 6 March 2001.

[5] "Zerkalo" newspaper, July 1992.

[6] "Mukhalifat" newspaper, 28 April 1992.

[7] "Megapolis-Express", No. 17, 1992.

NAGORNO KARABAKH AND ARMENIA

A report by Physicians for Human Rights (UK)
on the abduction and torture of ethnic Armenians

SUMMARY

In late summer 1997, four members of Physicians for Human Rights (UK) carried out an investigation that confirmed the alleged practice of hostage taking and torture of ethnic Armenians by Azeris. Two physicians, a psychiatrist and a mental health social worker interviewed and examined 67 subjects.

These subjects had been taken hostage from Nagorno Karabakh, Armenia, Azerbaijan, Georgia, Turkey and Ukraine. Nationals of Georgia, Ukraine and Turkey have also participated in the abduction of Armenians, at times for financial gain. Equal proportions of three-quarters of the subjects were abducted from either Azerbaijan or NK. Two subjects who were abducted in Georgia and one who was arrested in Ukraine were sold to Azeris. A woman arrested in Turkey was transferred to Azerbaijan.

According to the Report, published in 1997, the arrest or capture of hostages had taken place between 1990 and 1996, that is not only during, but also before and after the period of military activities. At the time of abduction victims were aged between 1 and 73 years of age. Five were still children of less than 15 years.

All 67 subjects had been imprisoned in Azerbaijan. Twenty of them were held hostage by civilians, 47 subjects were held in prison or equivalent official place of detention. Those held by civilians had been bought from Azeri authorities specifically to be exchanged for their relatives. Testimonial evidence suggests that Azeri authorities have in many cases murdered imprisoned ethnic Armenians.

All 67 *hostages* have given credible testimonies of abduction and captivity lasting between 2 weeks and five years, during which all 67 had been subjected to varying degrees of both physical and non-physical torture.

All had endured beatings, often daily. Up to 50% of subjects has suffered some form of sexual violence and a wide variety of other physical and psychological tortures. Most subjects exhibited some degree of psychological trauma and up to 90% may have developed a clinically significant psychiatric disorder as a consequence of their experience.

Subjects either passively witnessed, or were deliberately forced to witness 35 itemised atrocities perpetrated on fellow prisoners including rape, beatings and murder.

Information alleging health care workers involvement in torture was collected. Nine Azeri doctors were described as either torturing or neglecting Armenians. 10 subjects described Azeri doctors taking part in physical maltreatment of patients including beatings and major surgeries without anaesthetic.

Personal statements confirmed by examination, have lead the delegates of the Physicians for Human Rights (UK) to believe that Azerbaijan has breached the following international Conventions of human rights since the time they acceded to them between August 1992 and August 1996:

- The International Covenant on Civil and Political Rights,
- The Convention on the Rights of the Child,
- The International Convention on the Elimination of All Forms of Racial Discrimination,
- The Convention on the Elimination of All Forms of Discrimination against Women,
- The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,
- The Convention on the Prevention and Punishment of the Crime of Genocide.

In addition, there is an abundance of information suggesting that further conventions have been breached, and that several fundamental human rights, as laid out by the UN in the Universal Declaration, ignored.

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Fifty-eighth session
Agenda item 9

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Letter dated 26 March 2002 from the Permanent Representative of Armenia to the United Nations Office at Geneva addressed to the Chairperson of the fifty-eighth session of the Commission on Human Rights

With reference to document E/CN.4/2002/151, dated 22 March 2002, circulated by the delegation of Azerbaijan under agenda item 9 of the present session of the Commission on Human Rights, I regret to witness yet another attempt of the delegation of Azerbaijan to offer this session a grossly distorted and inadequate information regarding the issue of Nagorno Karabagh.

The attempts of the delegation of Azerbaijan to mislead this session are particularly unacceptable at a time when the parties concerned and the co-Chairs of the Minsk Group have in the course of the past few years been stepping up their efforts to bring about a just and peaceful resolution to the conflict.

The consistent denial by the authorities of Azerbaijan to allow the people of Nagorno Karabagh to exercise their legitimate right to self-determination has been the root cause of the sufferings and destitution of the people of the region. The delegation of Azerbaijan should be aware of the mass pogroms, killings and deportations of the Armenian population in Azerbaijan, of the deplorable crimes against Armenians in Baku, Sumgait, Kirovabad and other towns and villages of Azerbaijan.

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The power struggle within Azerbaijan at the time the delegation of Azerbaijan refers to in the above document added considerable problems to the issue of Nagorno Karabagh. In an interview with Ms. Dana Mazalova, a Czech journalist, published in Nezavisimaya Gazeta on 2 April 1992, Mr. Ayaz Mutalibov, former President of Azerbaijan, made the following comments and observations: "... the militia of the Azerbaijani National Front (ANF) actively obstructed and actually prevented the evacuation of the local civilian population from the zone of military operations through the mountain passages specially left open by Karabagh Armenians". In its September 1992 report the Helsinki Watch non-governmental organization wrote that: "An Azerbaijani woman is confirming that Armenians had advised the Azerbaijani civilian population of Khojalu to leave the town with white flags raised .... The Azerbaijani militia shot those who attempted to flee". These and numerous other facts attest to the aim of the rival political forces in Azerbaijan to exploit the events in Khojalu in order to achieve their narrow goals of seizing power in Baku. As a result, they achieved a major deception of their own people.

I request that this letter be circulated as an official document of the fifty-eighth session of the Commission on Human Rights, under agenda item 9.

(Signed): Zorab MNATSAKANIAN
Ambassador
Permanent Representative

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Note verbale dated 27 March 2002 from the Permanent Mission of Armenia to the United Nations Office at Geneva addressed to the secretariat of the fifty-eighth session of the Commission on Human Rights

The Permanent Mission of the Republic of Armenia to the United Nations Office and Other International Organizations at Geneva presents its compliments to the secretariat of the Commission on Human Rights and has the honour to request the circulation of the attached* information as an official document of the fifty-eighth session of the Commission under agenda item 9, "Question of the violation of human rights and fundamental freedoms in any part of the world".

* Reproduced as received, in English only.

Annex

10 YEARS OF MARAGHA MASSACRE (Armenian village in Mardakert region of Nagorno Karabagh)

10 years passed since Maragha tragedy -the hell which remains only as a horrible memory, victims of which have lost everything - lives, families, homes, motherland and...belief.

"The name of this village is associated with a massacre which never reached the world's headlines.."[1].The 10th of April 1992 for Maragha inhabitants became the last day of their lives. The innocent population of this Armenian village of the Mardakert region of Nagorno Kharabakh was slaughtered by Azeri army and forgotten.

In chain of tragic events related to the Karabakh conflict the Maragha atrocities take a special place both by the brutality in relation to civilians, the number of people, massacred and by the aftermath which those events led to.

The Geneva-based Christian Solidarity Worldwide human rights group witnessed the massacre of the Armenians in Maragha (Maraghar). This bloodbath was perpetrated by Azeri neo-fascist paramilitaries and witnessed by Baroness Cox, who is also the Deputy Speaker of the House of Lords of the British Parliament. She testifies:

"On April 10, 1992, forces from Azerbaijan attacked the Armenian village of Maraghar in northeastern Karabakh. The villagers awoke at 7 a.m. to the sound of heavy shelling; then tanks rolled in, followed by infantry and civilians with pick-up trucks to take home the pickings of the looting they knew would follow the eviction of the villagers. Azeri soldiers sawed off the heads of 45 villagers, burnt others, took 100 women and children away as hostages, looted and set fire to all the homes, and left with all the pickings from the looting. *I, along with my team from Christian Solidarity Worldwide, arrived within hours to find homes still smoldering, decapitated corpses, charred human remains, and survivors in shock. This was truly like a contemporary Golgotha many times over."* [2]

According to other sources 60 people had been massacred and 100 were missing, suffering a fate worse than death. Getting the permission of the survivors the photographs of the exhumed bodies were taken as an evidence of the massacre.

For the first time Maragha village has been attacked on 26th of February. On April 10, 1992, forces from Azerbaijan attacked the village of Maragha for the second time.

Brutality of the Maragha slaughter was unprecedented - even bodies of the victims were subjected to profane and vandalism by perpetrators. Despite the danger survivors of the massacre were brave enough to return to the village to bury the bodies of their family members on 22nd of April. Their courage did not save them from the next Azeri attack the OMON continued the elimination and slaughter unless the last Armenian left the village.

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[1] Helsinki Watch

[2] Article by Baroness Caroline Cox "Survivors of the Maraghar Massacre: It was Truly Like a Contemporary Golgotha Many Times Over," Christianity Today, April 27 1998, Vol. 42, No. 5, p 92. The original version of the article is available from the online edition of Christianity Today.

The ones who died immediately had better faith then many of those taken hostages. Maragha victims were murdered, their bodies were defragmentated, burnt and decapitated, smashed by the Azeri tanks. Hostages were sold to whomever they wanted and treated as if they were things. Some of them were treated by the Head of Mirbashir's prison as if they were dogs, Azeris did not let them stand up or speak, feeding them with the flesh of their own relatives. The phenomenon of this massacre was that the inhabitants of Maragha were showing resistance. The horrors of the 10th of April were not the end of the massacre. The Maragha survivors returned to their homes hoping that this was a tragic accident, not a planned genocide. Their courage didn't save them from the repeated massacre - on 22nd of April the Azeri OMON returned and "finished" the task, killing those who survived. But even after this the last survivors returned to Maragha to bury the bodies of their relatives.

The deportation of the Maragha's population was accompanied with the acts of violence and other forms of human rights violations. The massacre was committed by a concrete armed formation of the Azeri army, and it's not accidental that many of hostages happened to find themselves in houses of Interior, Defense Ministries and OMON officials - evidences are provided by eyewitnesses, exchanged or bailed out hostages.

According to the records of the victims more then 60 people were murdered only on 10th of April, half of them were women, 53 were deported and taken hostage 29 of them were murdered in hostage, in Azerbaijan. 26 hostages were returned, but taking into consideration that the Armenian population of Maragha has been attacked for several times, the number of hostages is counted as more than 70.

19 hostages held captive, most probably had been tortured to death. The village was greatly destroyed, *the population* was deported. Houses were pillaged and then most of them were burnt down.

9 children were returned to their families thanks to the efforts of Armenian side and some NGO-s from Azerbaijan. At present the survivors of Maragha genocide live in Armenia and Russia, mainly in Voronezh region.

The videotape on exhumation of bodies of Maragha victims demonstrates signs of tortures - they were profaned and disfigured after the death. Neither this tape nor the testimonies of victims were publicized or covered by the international media. Only some international human rights-related organizations such as Helsinki Watch, Amnesty International, and the Christian Solidarity Worldwide responded to the Maragha tragedy. All the appeals of the victims to the Human Rights Committee received no response.

A few survivors of the massacre are left without any kind of assistance. They live in poverty, without a shelter. There exists no possibility for them for their physiological and psychological rehabilitation.

The Maragha genocide was one of a dozen of massacres against the Armenians of Nagorno Karabakh and other parts of the former Azerbaijani SSR. Similar mass executions, ethnic cleansing, deportations and massacres took place in the cities of Sumgait, Baku, Kirovabad, Shushi (Shousha) as well as in the Armenian-populated villages of Getashen, Martunashen, Karin-Tak, Karachinar, Arakel, Buzluk, Horek (Talish), Manashid, Nidj, Berdadzor, Hin-Shen, Tas-Verst (Tzakhkadzor), Khandzk, Hin-Tagher, Dolanlar, Kichan, Kadjavan, Karing (Arpagyadouk), Togh, Shurnukh, and Znaberd (Aznabyurt; the last Armenian village in Nakhichevan).

According to the testimonies of Maragha survivors the actions of the Azeri authorities were well organized and executed, which means that the atrocities were planned in advance.

The massacre of Maragha remains unpunished, perpetrators are free, victims passed through the hell of captivity - forgotten and left to the mercy of fate.

International community should give its fair evaluation of brutality and unbelievable barbarous acts of violence committed against innocent Armenians who lived peacefully without suspecting that monsters and perpetrators would not miss their chance.

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The Permanent Mission of the Republic of Armenia to the United Nations Office and other international organizations at Geneva presents its compliments to the secretariat of the Commission on Human Rights and has the honour to request that the attached* information be circulated as an official document of the fifty-eighth session of the Commission under agenda item 9, "Question of the violation of human rights and fundamental freedoms in any part of the world".

* The annex is reproduced as received in the language of submission and in English only.

Annex

FACTS RELATING TO THE ANTI-ARMENIAN POGROMS IN SUMGAIT IN FEBRUARY 1998

More than 14 years have passed since Sumgait. Sufficient time for a full appraisal of the gravity of this tragic event for the Armenian people.

The events of Sumgait were a natural consequence of the atmosphere of total lawlessness, in which the Azerbaijani leaders spurred on the zealots in the country and incited them to further Sumgait-like atrocities. Whipped up into a state of nationalist histeria, the deceived masses perpetrated vicious crimes, burning people alive, demonstrating how easily entire multitudes could be reft of any semblance of humanity and many hundreds of people transformed into bloodthirsty sadists. Yet what is possibly still more monstrous than these barbarous acts is the way that the fine upstanding citizens entrusted with the reins of power in the republic and in the country did everything they could to conceal the truth about Sumgait and to shelter the culprits from justice. The impunity enjoyed by the instigators and organizers of the Sumgait pogrom is proof that the State itself took them under its wing. The way that events subsequently developed in Azerbaijan graphically demonstrated that the Sumgait approach to the settlement of ethnic scores was to be the chosen method. As early as May 1988, on the initiative of the Shusha district Party committee, the process of deporting Armenians from Shusha was commenced. In September, the bloody events took place in the village of Khojaly and the last Armenians were driven out of Shusha. In November pogroms were being waged throughout Azerbaijan. Yet there was no response - neither political, nor legal - to any of these actions. An atmosphere of total impunity prevailed, in which there were repeated incitements to the perpetration of further Sumgait-like massacres. For its part, the Azerbaijani leadership only gave encouragement to those who showed the greatest zeal.

The Sumgait events were organized with a view to hushing up and concealing the Nagorny Karabakh problem. A wave of anti-Armenian demonstrations swept across all Azerbaijan in February 1988, but it was decided to deal the most decisive blow against the Armenians of Sumgait - as the most defenceless. Thugs were bussed into Sumgait from other regions and local officials drew up lists of all Armenians. Members of the country's top brass - the first secretary of the Central Committee and the chairman of the Council of Ministers of Azerbaijan - also made their way to Sumgait. Every possible preparation was made: even supplies of cobblestones were brought into the city. The only thing which the organizers of the Sumgait events had not reckoned with was that there might be honest and courageous people among the Azerbaijanis themselves who would refuse to succumb to the hysteria being whipped up. Had it not been for them, the city's entire Armenian population would have been mercilessly slaughtered. Sumgait was destined to transform the problem of Nagorny Karabakh and the will of its people - an essentially democratic issue - into one of the world's implacable ethnic conflicts.

Sumgait represented the focal point of the genocidal policies conducted by the Azerbaijani leaders against Armenians, one inevitable result of which was the "cleansing" of the Nakhichevan region and other historically Armenian territories of their Armenian populations.

In the course of three days in February 1988, virtually the entire territory of this city, with its population of a quarter of a million, became the arena for wide-scale, unrestrained pogroms against the Armenian population. Dozens were killed, a significant number of whom had been burned alive, after being beaten and tortured. Hundreds were wounded, many of them left disabled for life. Women and young girls were raped. More than 200 homes were wrecked and looted, scores of motor cars were set alight or smashed up, and dozens of workshops, shops, kiosks and other social facilities were smashed and plundered. Thousands of people became refugees.

And yet is this the only measure of the tragedy - how many people were killed in this city or how many homes were wrecked and looted? Immeasurable moral losses were suffered not only by the victims of the tragedy, but also by the people in whose name these atrocities were committed. "After the barbarities of Stalinism", wrote Moscow academics in their "Open letter to friends in Armenia", "no single event has occurred in our country that has dragged us further back from civilization to savagery". Sumgait turned two neighbouring peoples - Armenians and Azerbaijanis - into unconcealed and irreconcilable enemies and had exceptionally severe consequences for their subsequent relations with one another. Sumgait demonstrated for the first time that, in a multi-ethnic State which upheld friendship among peoples as one of its most hallowed principles, people could be killed quite simply because they belonged to the wrong nationality.

The first Sumgait "rally" was not particularly well supported but the second, organized the following day, 27 February, was attended by thousands of people, many of whom had been sent out on to the city square on the orders of their managers and supervisors. Among the rallying calls, uttered not only by the instigators, but also by such prominent citizens of Sumgait as the headmaster of secondary school No. 25 and a well-known actress from the Arablinksy Theatre, were references to Armenian "atrocities" and the "martyrs" of Kafan, the Karabakh issue, and the need to punish the Armenians, to kill them and to drive them from Sumgait and from Azerbaijan in general. The constant refrain of many harangues and the most often repeated slogan of those days was "Death to Armenians!". Besides words, other means of agitation were also used, such as vodka and drugs, dispensed directly from lorries to members of the crowd in great quantities and free of charge.

In the evening of 27 February, the "rallies" had degenerated into wide-scale violence. The first beatings and pogroms continued late into the night and then, the following day, hundreds of people who had been directly involved in the perpetration of these crimes assembled for their next "rally", just as if nothing untoward had happened. This is an extremely important point: the participants in the pogrom were thereby given definitive assurances of their impunity. The culmination of the "rally" on 28 February was reached when Muslim-zade, first secretary of the Sumgait city Party committee, took up the State flag of the Azerbaijani SSR and led the huge crowd which had gathered behind him on to Lenin Square. Thereupon the crowd scattered and, already equipped with weapons, launched their attacks against the homes of Armenians ...

The bloody tragedy which unfolded in Sumgait encompassed every imaginable human crime and suffering. We cannot but be astounded by the scale and impunity of the pogrom and the cynicism and brutality with which it was conducted. The crimes of those days seem quite

inconceivable when we consider that the gangs perpetrating them were made up not of professional murderers and sadists, but of ordinary citizens, predominantly young people. For an explanation, we must look back in history and consider certain ideological and psychological realities. The massacre of Armenians in the city of Baku in 1918, the massacre in Shusha in 1920, the methodical expulsion, which ultimately achieved a 100 per cent success, of the indigenous Armenians from the Nakhichevan Autonomous SSR, countless crimes of an ethnic nature, the constant, virtually undisguised discrimination against the Armenian population throughout the Republic of Azerbaijan, the defiling of monuments to Armenian history and architecture, the hatred of Armenians instilled in children from their earliest years - all this must be taken into consideration if we are to understand how a student from a technical college or a factory worker who, prior to this, never did anything particularly reprehensible, entirely normal people with their own interests, family-oriented people, should suddenly prove capable of responding on the spur of the moment to incitations to kill their fellow citizens entirely innocent of any crime, to commit murders, and to perpetrate these acts with a pathological brutality that appalled even the forensic experts. And yet, however monstrous their offences, it is not they who are the prime culprits but those who were able so subtly and adroitly to transform them into monsters.

Since no condemnation was expressed and no punishment handed down for the crimes committed at Sumgait, they were followed by dozens of lesser and greater pogroms of the Armenian population of the Azerbaijani SSR, including in the capital city, Baku, where more Armenian blood was spilled.

And with the passing of time, even in Sumgait, where no Armenians remained, persecutions were mounted against those who had saved Armenians during the days of that February hell, while at rallies in Baku the butchers of Sumgait were hailed as nothing less than national heroes.

The consequences of connivance are plain for all to see. "Sumgait became a spur for new tragedies and bloodshed", wrote the academics in their "Open letter to friends in Armenia". "While the blood of Sumgait might be on the hands of those who organized and carried out this bacchanal, responsibility for what followed rests with all those who failed to respond to the scale of the tragedy, who failed to understand and to this day fail to understand that no one, be he or she Lithuanian or Jew, Bashkir or Russian, that no people and no single person can feel safe while the crimes of murderers are allowed to go unpunished".

The organizers and the perpetrators of the Sumgait atrocities must be punished.

The peoples of the world must know the truth about the cruelty and barbarity of the Azerbaijani authorities and the criminals responsible for this monstrous crime.

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